A Review of Legal Aid Manitoba

March 2004

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Legal Aid Manitoba Review

March 15, 2004

The Honourable Gord Mackintosh
Minister of Justice
Attorney General
Room 104, Legislative Building
Winnipeg MB R3C 0V8

Dear Minister:

I am pleased to enclose my report on Legal Aid Manitoba. I trust that my report adequately responds to the Terms of Reference as provided to me on November 28th, 2003.

Respectfully submitted,

Ron Perozzo, Q.C.

Executive Summary

This report is in response to a request from the Minister of Justice and Attorney General of Manitoba for advice on how to move to a greater reliance on staff lawyers to deliver legal aid services in Manitoba. The report provides a brief history of legal aid in Manitoba and then sets out the law and policies surrounding government funded counsel. It next briefly reviews eligibility guidelines that determine who is eligible for legal aid in Manitoba and reviews the services provided by Legal Aid Manitoba. For both eligibility and coverage, the review concludes that Manitoba compares favourably with other provinces.

The report then discusses Legal Aid Manitoba funding and expenditures over the past fourteen years, comparing these with other provinces, and in particular with Saskatchewan. In both respects, the report concludes that Manitoba compares well in that it has not had to make the drastic reductions that have been made in some other provinces. The differences between Manitoba's cost and Saskatchewan's cost are less significant than first thought and can largely be explained by differences in coverage rather than differences in the delivery of service.

The report then reviews the literature and research on the main delivery models for legal aid. The models are judicare, staff, and a model that uses both staff and the private bar to deliver services, which is referred to as the mixed model. Based on the research, the report concludes that Manitoba should maintain a mixed service delivery model unless there are compelling financial or other reasons to change. The percentage of services delivered by staff or the private bar in the mixed model may vary over time and that decision is a function of the tariff paid to the private bar, the cost of staff, and the productivity of staff.

The report then moves on to cost various options of service delivery, using two primary costing approaches. The approaches are based on an average cost per case for staff and for the private bar in criminal and family cases. The average costs per case are then applied to various scenarios, to arrive at a net savings or cost as a result of the change in service delivery options. Transition costs, those costs that will result from a change in service delivery methods, and start up costs are then added to the results to arrive at a final cost or savings from each specific scenario.

The most reliable private bar and staff average costs per case in Manitoba were determined to be as follows:

	Private Bar	Staff
Criminal	$619.53	$489.95
Family	$716.51	$955.49

Applying these costs to the various scenarios, using an increased staff component, revealed that:

- A complete staff system will cost more than the current mixed system. While the analysis revealed that there were savings that resulted from using more staff lawyers for criminal cases, it was more expensive to use staff lawyers for family cases. The costs with respect to family cases were much greater than the savings from criminal cases resulting in an overall net cost to change to a complete staff system. When transition costs were included, the net costs of moving to a complete staff system were substantial.

- Legal Aid Manitoba can achieve cost savings in the criminal area with increased reliance on staff, but because of transition and start up costs, the savings will not be realized until the third year of implementation.

The specific scenario determined to be optimal is setting up a separate office in Winnipeg made up of ten staff lawyers to conduct criminal cases. A separate office will allow Legal Aid Manitoba to minimize conflicts and act in both usual and larger cases. While this scenario does not provide a saving in the first year, it does not require any extra expenditure after the first year, and in three years has recouped the initial investment. It continues to provide savings in future years. The cost or savings that result from this scenario at three standard production levels, over a ten year period, are as follows:

Production Level (Annual Caseload Per Lawyer)	(Cost) or Savings
250	$(653,800)
280	$1,258,700
300	$2,556,000

The report notes the importance of maintaining a minimum caseload of 280 cases per year, and suggests not adding the staff unless there is some comfort that the target can be met. The report also notes that Legal Aid Manitoba must be able to assume responsibility for some larger criminal cases (those cases that cost over $10,000), the majority of which are currently only assigned to the private bar.

The report does not recommend moving to a complete staff system. The reasons have to do with the sustainability of any one model, cost, availability of counsel, conflicts, and variations over time in productivity and the tariff.

The report then discusses governance and independence, finding Legal Aid Manitoba as independent as any other plan in Canada. It offers some examples of good governance attributes for consideration by Legal Aid Manitoba and suggests the appointment of a half to full time chair for the next year or two. The report also suggests that the government consider greater autonomy for the plan.

Finally, the report deals with the steps the government would have to take to pursue its articulated objective of a greater reliance on staff. These include removing choice of counsel, structuring the Legal Aid offices to deal with conflicts, making legislative changes to deal with conflicts, and gaining confidence on productivity levels. Suggestions for further investigations are also provided.

1. Introduction

On November 25, 2003, the Honourable Gord Mackintosh, Minister of Justice and Attorney General of Manitoba announced a review of Legal Aid Manitoba (LAM). The purpose of the review was to examine the most appropriate means to deliver legal aid services with a greater reliance on staff lawyers.

The reviewer was asked to undertake research and provide the Attorney General with advice and recommendations on the future delivery of legal aid services to indigent persons in Manitoba. In particular, advice was sought on the following issues:

1. What is the best way to move towards greater reliance on staff lawyers?

2. What would the service delivery model look like?

3. In what manner would legal services be delivered?

4. What legislative, policy and organizational changes would be required to achieve this objective?

The terms of reference for the review are attached as Appendix A.

The reviewer was also asked to pursue the goal of cost neutrality. Whatever the results, the costs should not be greater than current costs. The reviewer was authorized to consult with the Manitoba Bar Association, the Criminal Trial Lawyers Association, the Legal Aid Services Society of Manitoba, the Law Society of Manitoba and any other organization or individuals the reviewer felt might assist it in the development of its advice and recommendations.

The reviewer was asked to provide regular updates to Bruce MacFarlane, Q.C., the Deputy Attorney General of Manitoba, and complete a final summary report on or before March 15, 2004.

The reviewer was assisted in an advisory capacity by the following Manitoba Justice personnel:

- Dave Brickwood, Executive Director, Integrated Legislative Response Team, Manitoba Justice;
- Sarah Lugtig, Policy Analyst, Policy Development and Analysis Division, Manitoba Justice;
- Candace Reinsch, Manager of Corporate Services, Administration and Finance Division, Manitoba Justice
- Jeff Schnoor, Director, Policy Development and Analysis Division;
- Heather Leonoff, Director, Constitutional Law Branch; and
- Cynthia Devine, Crown Counsel, Constitutional Law Branch.

Administrative support was provided by Wendy Bergmann of Manitoba Justice.

In approaching its task the reviewer undertook a literature review of legal aid research, including reviews of other legal aid plans, conducted its own financial and statistical analysis and consulted widely. The reviewer consulted with other Canadian legal aid plans, especially Saskatchewan, Nova Scotia and Newfoundland and Labrador, that rely on staff lawyers to deliver legal services more than other plans in Canada, as well as British Columbia, which has done a great deal of work on governance and has made the most recent significant revisions to legal aid legislation. The reviewer also consulted with the Minnesota Public Defender, Legal Aid Manitoba staff, the Acting Chair of the Board of Directors of Legal Aid Manitoba, and Manitoba lawyers. A complete list of those consulted is attached as Appendix B.

It is important to note the limits of this review. It is not an operational review. The reviewer did not interview staff at Legal Aid Manitoba on day to day operations, chart processes, examine cost-effectiveness or look for redundant or ineffective processes as one might in an operational review.

The review did not engage in an analysis of what legal aid should be or what services should be offered. There are a number of articles that talk about unmet needs in legal aid.[1] For a view of what legal aid would do if it met current unmet needs see *The Legal Aid Crisis: Time For Action*[2], a background paper prepared for the Canadian Bar Association by Melina Buckley.

Finally, the review does not comment on the adequacy of any level of legal aid funding other than to set out the last fourteen years of funding for legal aid and place it in context among other legal aid plans. The review avoids the debate on adequacy or non-adequacy of the current level of funding for legal aid as this is, essentially, a political decision. As Justice Steel of the Manitoba Court of Appeal said in a recent case:

> I am not without sympathy for lawyers whose remuneration is based on a Legal Aid tariff that may not cover their overhead. I sympathize with Legal Aid Manitoba, whose budget has for the last few years left them in a deficit position. Nor would I wish to be a member of the Cabinet, who, everyday, must decide between funding a myriad of equally valuable programs.[3]

The review does, however, note that there are at least two views on funding legal aid, each emphasizing a different approach. One view sees legal aid as a type of somewhat open-ended social welfare program. An example of this position is illustrated in the Canadian Bar Association background paper, which proposes that the Canadian Bar Association platform on legal aid include the point that "legal aid must be recognized as an essential public service, like medical care"[4] and that funding must be increased significantly.

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[1] See A. Currie, *The Nature and Extent of Unmet Need for Criminal Legal Aid in Canada* (Department of Justice Canada, 2003). See W.A. Bogart. C. Meredith & D. Chandler. *Current Utilization Patterns and Unmet Legal Needs.* In Ministry of the Attorney-General for Ontario. Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services (1997) (Volume 2). pp. 313-371. In addition, the Canadian Bar Association (Manitoba) reiterated its position in oral and written submissions to the reviewer that people in Manitoba have significant unmet legal needs and that Legal Aid Manitoba is "grossly underfunded."

[2] See M. Buckley for the Canadian Bar Association. *The Legal Aid Crisis: Time for Action* (June 2000) [hereinafter referred to as Buckley].

[3] *Winnipeg (Child and Family Services)* v. *A.(J.)*, [2003] M.J. No. 454 (C.A.) , [hereinafter *Winnipeg CFS* v. *J.A.*] at para. 58.

[4] Buckley, *supra* note 2 at 95.

Another view, while not completely incompatible with the first, places more emphasis on the current trend for governments to operate within fixed budgets. This view is expressed as follows in *From Crisis to Reform: A New Legal Aid Plan for Ontario*:

> Traditionally, Ontario Legal Aid has been an open-ended, demand-driven program administered by the Law Society of Upper Canada. Under the *Legal Aid Act*, the Plan is statutorily compelled to provide certificates to all applicants who meet qualifying criteria. This has meant that the number of certificates granted by the program each year was effectively determined by the number of persons seeking legal assistance. Moreover, the services to be provided to individuals receiving certificates were largely determined by the providers of the service.
>
> This kind of open-ended, demand-driven program was not uncommon in the 1960s and 1970s, when government revenues and budgets were constantly expanding. But in the more fiscally conscious 1990s, governments of all political stripes in Canada have come to assume that the vast majority of government programs must be operated on a fixed budget, and that those funding the service must have the ability to control their overall costs.[5]

This review, in light of its mandate, is targeted at examining the question of whether a greater reliance on staff lawyers would be less expensive than the current model or provide other benefits. In conducting the review, I have assumed that the major focus of Legal Aid Manitoba, and hence its Board and senior management, is to find the most sustainable, cost-effective method possible to deliver legal services to indigent persons. Every dollar spent delivering services in a less than cost-effective manner is a dollar lost.

The goal of the review was not only to make recommendations, but also to provide information that would allow others to assess the quality of its recommendations, conduct their own analysis and reach their own conclusions. In attempting to meet this goal, the review provides a brief history of legal aid in Manitoba, a summary of the legal principles governing legal aid, a discussion of the important issues involved, a current and historical financial analysis, a comparison of Manitoba's legal aid plan with other plans, detailed costing estimates of different legal aid delivery models, a discussion of independence and governance of the plan, and my conclusions.

Before proceeding further, it may be worthwhile discussing a few terms that will occur very frequently in this report. The essence of a legal aid plan is what services it provides -- its "coverage" --, to whom it provides the services -- who is "eligible" for the services --, how it delivers the services -- its "delivery model" --, and its "governance framework". Because all of these aspects of a plan differ from province to province, it is difficult to compare one plan to another but, with the appropriate caveats, the review does try to make comparisons that the review believes are meaningful.

Coverage generally refers to what type of services are offered and how extensive those services are. For example, most plans deliver the minimum criminal law and young offender services required by the Constitution, statutes and cost sharing agreements with the federal government.

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[5] F. Zemans and P. Monahan. *From Crisis to Reform : A New Legal Aid Plan for Ontario* (North York: York University Centre for Public Law and Public Policy, 1997) at 1 [hereinafter Zemans and Monahan].

Services in the area of family law vary widely as do services in the area known as poverty law, which often involves representation before administrative tribunals such as the Residential Tenancies Commission, Workers' Compensation Board, Social Services Appeal Board and other similar boards and tribunals.

Eligibility, as stated, refers to who is eligible to receive the services, usually based on income. The fact that plans use differing measures of income, such as net or gross income and sliding scales, makes comparisons among plans difficult.

There has been a long debate over the cost and quality of different delivery models. One model, known as "judicare", uses private practice lawyers paid by the provincial legal aid plan to deliver services to those granted a legal aid certificate. This is the primary delivery model in British Columbia, Ontario and Alberta. Other plans use lawyers employed by the plan to deliver services to those found eligible. This is known as a staff lawyer system and is the primary delivery mechanism in Saskatchewan, Newfoundland and Labrador, Nova Scotia and Prince Edward Island. Still others use a mix of both private bar lawyers and staff lawyers, which is known as a mixed system. This is the delivery model used in Manitoba and Quebec. The review will discuss the current research on delivery models later.

At times the term "public defender" is heard. This is really an American expression used to describe a staff lawyer system to deliver criminal legal services to indigent persons. In Canada, as the staff lawyers may be delivering adult criminal, youth, family or other services, the preferred term is a staff lawyer system. The reviewer consulted with John Stuart, State Public Defender for the Minnesota State Board of Public Defense, but determined that the differences in the legal systems and practice made comparisons extremely difficult and thus I decided to focus my consultative efforts on other Canadian legal aid plans. A brief summary of the Minnesota State Board of Public Defense operations is contained in Appendix C for reference purposes.

2. Legal Aid in Manitoba: A Brief History

To set the context for the current discussions surrounding legal aid, the review provides a short history of legal aid in Manitoba.

Before legal aid became a legislated government-funded program in Manitoba in 1971[6], low-income Manitobans who needed legal advice had to rely on the charity of individual lawyers who were willing to advise or represent them for no or for a nominal fee and on the criminal courts' common law power to order an individual lawyer to represent an accused who could not afford one where an unfair trial would otherwise result[7]. The *in forma pauperis* procedure was also available in civil lawsuits, which allowed an individual without financial means to apply to have his or her court fees waived.[8] As help was provided on a charitable basis, "coverage" for poor litigants was far from universal. Also, court-appointed counsel often did not become involved until fairly late in the criminal process, meaning that accused individuals often plead guilty and were sentenced without a lawyer present.[9] That being said, the legal profession in this province made a significant contribution to fulfilling the need of low-income people for legal representation. Many lawyers and judges continue to view the provision of *pro bono* legal services to people without financial means as a long-standing professional and ethical obligation "that is found at the very core of the profession".[10]

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[6] N. Larsen, "Seven Years with Legal Aid (1972-79): A Personal View of Some Events and Background Literature" (1981) 11 Man. L.J. 237 at 241; *The Legal Aid Services Society of Manitoba Act* S.M. 1971, c. 76; now *The Legal Aid Services Society of Manitoba Act*, C.C.S.M., c. L105 [hereinafter *The Legal Aid Services Society of Manitoba Act*].

[7] *Ibid.*

[8] N. Larsen, "Legal Aid in Manitoba" in C. Harvey, ed., *The Law Society of Manitoba 1877-1977*, (Winnipeg: Peguis Publishers, 1977) 158 at 159 - 160. [hereinafter *Legal Aid in Manitoba*]. Regarding the in forma pauperis procedure

The first organized "legal aid" program in Manitoba (and, for that matter, in Canada) was a co-ordinated effort by the legal profession to provide such *pro bono* services to poor people in civil matters. In 1937, the Law Society of Manitoba (LSM) set up a program through which poor clients could apply to a special committee for a certificate appointing a lawyer free of charge. A "Poor Man's Lawyers Centre" was also established, with volunteer lawyers providing advice. The Law Society of Manitoba responded in a similar fashion to the need for legal representation for poor accused in *criminal* matters a decade later. Starting in 1949, members of the bar were invited to sign up to take part in a criminal legal aid program. The Law Society of Manitoba set up a roster under which one lawyer was assigned to the magistrate's court each week.[11] As was the case with civil legal aid, the Law Society of Manitoba's criminal legal aid program bears the "distinction of being the first of its kind in Canada."[12]

The demand for free legal services grew rapidly during the 1950's and 1960's. Unfortunately, not enough lawyers participated in the program to meet the need. Civil lawyers who had once accepted a *pro bono* case every four to five years were conducting one every three months by 1970. Those on the criminal roster went from taking one case every nine months in 1960 to one per month a decade later. In one two-year period (from 1964 to 1966), the number of criminal certificates rose by 75 per cent.[13] Everyone was unhappy with a state of affairs that appeared to be fast reaching a crisis point, from the overburdened lawyers who participated in the program, to the Law Society of Manitoba, to a public faced with restricted eligibility and increasing delays. Not surprisingly, pressure from the profession for a co-ordinated state-funded legal aid system mounted.[14] One should note, however, that not all lawyers agreed that the state should step in. Many continued to believe that "it would be 'unseemly' for lawyers to accept payment for legal aid work."[15]

In 1968, the provincial government began making block grants to the Law Society of Manitoba to cover some of their legal aid costs. These were increased substantially by the newly elected New Democratic Party government in 1969. In 1970, the new Attorney General, the Honourable Al

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please see: Mr. Justice J.C. Major, "Lawyers' Obligation to Provide Legal Services" (1995) 33 Alta. L. Rev (No. 4) 719 at 722 [hereinafter Justice Major]; This procedure is based on a British statute that became part of Canadian law upon confederation: *An Act to admit such persons as are poor to sue in forma pauperis*, 7 Henry VII 1495, c.12.

[9] *Legal Aid in Manitoba*, *supra* note 8 at 160.

[10] Justice Major, *supra* note 8 at 722.

[11] *Legal Aid in Manitoba*, *supra* note 8 at 161-162.

[12] *Legal Aid in Manitoba*, *supra* note 8 at 162;

[13] *Legal Aid in Manitoba*, *supra* note 8 at 164-165.

[14] *Legal Aid in Manitoba*, *supra* note 8 at 163-6.

[15] *Legal Aid in Manitoba*, *supra* note 8 at 167.

Mackling, appointed a committee to look into legal aid.[16] As Norm Larsen, a former Executive Director of Legal Aid Manitoba, explains:

> The Committee's 34-page report was made public in March 1971. Its broad recommendation was for the immediate establishment of a comprehensive and fully funded legal aid plan, administered by a non-profit, self-governing corporation. Eligibility for legal aid services was to be based on consideration of the applicant's eligibility to pay for legal services, having regard to his or her overall financial circumstances.[17]

Not long after, in July 1971, a Bill to establish a legal aid system along the lines recommended by the committee was introduced and passed unanimously. The only concerns expressed by Opposition Members during debates on the Bill were that the legal profession should be required to continue providing their services at reduced cost, that safeguards were needed to prevent unscrupulous lawyers from abusing the system, and that community law centres should serve as preliminary points of contact for those in need of legal advice. The Attorney General reassured his colleagues on all of these points.[18] In early 1972, the first Board of Directors was appointed by the Attorney General. Three board members were non-lawyers.[19]

Roland Penner and Arne Peltz describe the new program in these terms:

> Legal Aid Manitoba (LAM) was launched in 1972 as a so-called mixed system. Its conscious aim was to combine elements of the English "judicare" system [of publicly paid private lawyers] initiated by the U.K. Legal Aid and Advice Act of 1949, and the community or neighbourhood law office model developed in the U.S. as part of the "war on poverty".[20]

While the majority of funding for the program came from the provincial government, the federal government began sharing the provinces' costs for criminal and civil legal aid on a per capita basis in 1972, thereby covering close to 50 per cent of the program's costs. Some of the interest lawyers earned when holding their clients' money in trust also made up part of the legal aid budget, a budget contribution that later became legislated.[21] By 1977, 75 per cent of Manitoba's lawyers had placed their names on the legal aid roster. The profession continued to advocate with the provincial government on legal aid matters, however. For example, the Law Society of Manitoba's Legal Aid Liaison Committee expressed concerns that the freedom to choose one's lawyer that was protected in the new legislation was resulting in a very small number of lawyers handling most of the criminal cases. They were also concerned that the tariff (set by regulation at $25 per hour) was inadequate.[22]

Penner and Peltz observe that attempts by Manitoba's community law offices to follow in the steps of their counterparts in the United States and other Canadian provinces by involving clients in policy management and to employ social workers and other non-legal professionals to work with client groups in the community were ultimately unsuccessful. Due to growing case load demands on staff lawyers, who were, in any event, ill-equipped to engage in community based anti-poverty advocacy, the law offices soon focused almost exclusively on providing direct service to individuals.[23]

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[16] *Legal Aid in Manitoba*, *supra* note 8 at 168-9.

[17] *Legal Aid in Manitoba*, *supra* note 8 at 169.

[18] Manitoba, Legislative Assembly, Debates and Proceedings, Nos. 105-141 (20 July 20 1971) at 2903.

[19] *Legal Aid Manitoba*, *supra* note 8 at 169.

[20] R. Penner and A. Peltz, "The State of Legal Aid in Manitoba in 1997" (1998) 16 Windsor Y.B. Access Just. 271 at 271 [hereinafter Peltz and Penner].

[21] *Legal Aid in Manitoba*, *supra* note 8 at 169-170

[22] *Legal Aid in Manitoba*, *supra* note 8 at 169-172.

As Penner and Peltz comment, "[d]espite these problems and other growing pains, the plan performed well and its service to individuals expanded."[24] They remark that the total of all legal aid services provided by staff lawyers and the private bar expanded from 1975 to 1996 by 73 per cent and that staff lawyers' share of the services expanded slightly during this time from 25 per cent of all legal aid certificates to approximately 31 per cent.[25] In 1997, these authors describe a "relatively trouble-free continuation of the mixed system in Manitoba", citing reasons such as the geographic and social accessibility that is provided by the community law offices, "cost efficiencies provided through the employment of staff lawyers combining a number of functions e.g., client representation, "drop-in" advice and duty counsel work in the various courts", and "the continuing partnership arrangement with the private bar which, though critical of the low tariff according to which they are paid, receive[d] almost 70 per cent of all legal aid certificates issued by the system".[26]

2.1. Recent Events: A New Crisis for Legal Aid?

Not unlike the years immediately preceding the 1972 establishment of Legal Aid Manitoba, many would describe recent events in the province as a crisis point in legal aid's history. As the Honourable Gord Mackintosh, Attorney General and Minister of Justice for Manitoba, stated in a November 25, 2003 provincial government news release announcing this review:

> Legal aid in Manitoba must change....The status quo is unacceptable and we need to examine approaches and new ways of delivering service that adapt to the challenges being posed in light of the evolving legal environment of complex cases and increased costs.[27]

Since Penner and Peltz published their optimistic article in 1997, pressures on legal aid funding have mounted in this province. Many of these pressures can be traced to the new era of "more fiscally conscious" government noted in the introduction, characterised by fixed budgets and cost controls.

As explained elsewhere in this report, changes to federal government policy concerning legal aid funding reflected this trend and also translated into fewer federal dollars being available for legal aid in the province. A final additional stressor on funding has been the recent significant decrease in the interest earned on lawyers' trust accounts.[28] At the same time that resources have become tighter, however, cases have become increasingly complex and expensive and the demand for legal aid has continued to rise.

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[23] Penner and Peltz, *supra* note 20 at 272.
[24] *Ibid.*
[25] *Ibid.*
[26] *Ibid.*
[27] Government of Manitoba, News Release "Legal Aid to be Reviewed, Change on the Way: Mackintosh" (25 November 2003).
[28] See: D. Driver, "Manitoba Bar Angered at Cutbacks in Legal Aid Funding" *The Lawyers Weekly* (14 February 2003).

Manitoba is not alone in confronting these pressures, nor is it the first province to respond. A number of provinces have undergone reviews of and/or revisions to their legal aid programs in the past decade. Ontario and British Columbia, while maintaining models that rely heavily on the private bar, have both made significant reductions to legal aid funding.[29] Nova Scotia's 1996 Review also dealt with the need to make reductions.[30] Newfoundland and Labrador moved from a mixed model to a fixed-budget program delivered almost entirely by staff lawyers because it could not afford to increase the tariff to the substantial degree that the private bar demanded in order for it to remain in the plan.[31]

The impact of these and other pressures became particularly acute in Manitoba in 2003 as Legal Aid Manitoba's efforts to contain costs and avoid a projected deficit through reductions to the scope and amount of the legal aid tariff paid to private bar lawyers resulted in both actual (for the criminal bar) and threatened (for the family bar) withdrawal of service. Additional provincial and federal funding for legal aid, a tariff review and increase, and a reinstatement of coverage for certain kinds of cases appear to have convinced the private bar lawyers to continue to participate in the plan for the short term. [32] However, as late as October 2003, defence lawyers in the province began meeting again and some refused to accept legal aid certificates, particularly for complex cases. This followed concerns expressed publicly by individual defence lawyers about how Legal Aid Manitoba was handling the payment of exceptional fees in complex cases.[33]

One of the recurring themes the reviewer heard as the reviewer spoke to Legal Aid Manitoba staff, private bar lawyers and legal aid personnel in other provinces was the decline in the number of private bar lawyers prepared to accept legal aid certificates. This difficulty is particularly pronounced in the area of family law. A table illustrating changes over time in the number of private bar lawyers taking cases is provided below. Legal Aid Manitoba shows a steady decline in total lawyers receiving payments from 543 in 1993/94 to 358 in 2002/03.

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[29] Zemans and Monahan *supra* note 5 at 1 explain that the number of certificates issued under Ontario's plan dropped by 65 per cent from 1993-1997. See also the message from the Executive Director in the British Columbia Legal Services Society Annual Service Plan Report (2002/2003) at 2. In his letter, Mark Benton provides that "LSS was faced with the daunting task of replacing, by September 2002, an $85 million operation with one that could function on $55 million in government funding by 2004/05."

[30] Legal Aid Services in Nova Scotia : a report / by the Legal Aid Review Team for Nova Scotia Dept. of Justice, Nova Scotia Legal Review of Legal Aid Commission. [Halifax] Chair: Don Murray. (April 1996) at 2 [hereinafter Nova Scotia Report].

[31] Telephone interview with Newman Petten, Chief Executive Officer of Legal Aid Newfoundland and Labrador, January 5, 2004 [hereinafter Petten].

[32] See: D. Driver, "Manitoba Bar Angered at Cutbacks in Legal Aid Funding" *The Lawyers Weekly* (14 February 2003); D. Driver, "Battle over Funding of Legal Aid Plan Heating up Once More in Manitoba" *The Lawyers Weekly* (31 October 2003). D. Driver, "Manitoba Lawyers Refusing to take Legal Aid Certificates" *The Lawyers Weekly* (21 February 2003); D. Driver, "Manitoba Criminal Lawyers Reach Legal Aid Deal as Family Law Lawyers Threaten Pullout" *The Lawyers Weekly* (4 April 2003); D. Driver, "Manitoba Criminal Lawyers Reach Legal Aid Deal as Family Law Lawyers Threaten Pullout" *The Lawyers Weekly* (4 April 2003);. D. Driver, "Truce Reached in Manitoba Legal Aid War" *The Lawyers Weekly* (18 April 2003).

[33] D. Driver, "Battle over funding of legal aid plan heating up once more in Manitoba" *The Lawyers Weekly* (31 October 2003).

Table 2.1

Private Bar Lawyers Accepting Certificates

		Fiscal Year									
		1993/94	1994/95	1995/96	1996/97	1997/98	1998/99	1999/00	2000/01	2001/02	2002/03
Family	Total Lawyers Assigned Certificates	475	433	419	379	357	318	296	273	268	192
	5 or Less Certificates	241	211	200	165	166	160	160	130	138	88
	100 or More Certificates	10	7	6	8	10	11	11	10	13	12
	Total Certificates	10704	10218	9889	9085	9117	8746	8524	8614	8433	7834
Criminal	Total Lawyers Assigned Certificates	292	265	262	266	237	214	185	194	172	162
	5 or Less Certificates	137	129	122	128	118	93	77	85	68	55
	100 or More Certificates	26	24	23	14	7	14	13	18	22	23
	Total Certificates	11434	9127	9245	7391	6482	7035	7374	7540	7668	7391
Youth	Total Lawyers Assigned Certificates	170	149	155	149	130	137	125	111	101	95
	5 or Less Certificates	93	75	73	87	74	77	67	62	51	43
	100 or More Certificates	3	1	3	0	0	0	1	1	2	2
	Total Certificates	3479	3356	3346	1904	1482	1556	1502	1488	1480	1545
	Total Lawyers Receiving Payments	543	547	538	534	493	446	437	408	375	358

Notes - The Government of Manitoba fiscal year starts on April 1st and runs through March 31st of the following year.

Lawyers may receive certificates in more than one category (family, criminal and youth). As a result, the total lawyers receiving payments represents the number of individual lawyers from all categories that accepted certificates, i.e. in more than one category.

3. The Availability of Government Funded Legal Assistance: The Legal and Policy Context

In this section the review briefly describes the law concerning state-funded counsel.

The Legal Aid Services Society of Manitoba Act is provincial legislation that establishes an independent organization operating at arms-length from government to deliver legal aid in the province. As explained more fully in Appendix D – Legal Aid Coverage, *The Legal Aid Services Society of Manitoba Act* and its *Legal Aid Regulation*[34] set out the parameters governing the types of cases that will qualify for legal aid and establish that legal aid may only be provided to those who demonstrate sufficient financial need. Very generally speaking, if an individual demonstrates sufficient financial need and is charged with an indictable offence under Canada's *Criminal Code*[35] or faces extradition or indefinite detention as a dangerous offender, he or she has a right to legal aid. If that same individual instead risks incarceration or losing the ability to earn a livelihood as a result of being charged with a less serious criminal or provincial offence or under a municipal bylaw, is a young offender, or needs legal assistance in a civil matter, whether it relates to family, immigration or poverty law, the Regulations allow but do not require Legal Aid Manitoba to provide such assistance. Under the Act, an eligible individual is allowed to choose his or her lawyer unless the Board decides otherwise.[36] Of course, that lawyer must be prepared to work for legal aid rates.

The Legal Aid Services Society of Manitoba Act is not the only source of legal obligations that Manitoba's government must meet when it comes to providing legal services to low income people, however. Certain constitutional rights set out in the *Canadian Charter of Rights and Freedoms*[37] and a number of statutory rights provided in the *Criminal Code* and *Youth Criminal Justice Act*[38] impose certain duties on the provincial government to provide legal assistance to those who cannot afford it, even where these individuals are financially ineligible for legal aid. As will become evident, these obligations have implications for legal aid policy in the province, whether or not the government chooses to fulfil them through the mechanism of its legal aid plan. Also important to note is the Federal-Provincial Contribution Agreement Respecting Legal Aid, under which the Government of Canada provides some funding for criminal and immigration legal aid in the province. It also imposes obligations on the provincial government as conditions of receiving the funding. A summary description of these three elements of the external legal context affecting legal aid in the province is provided below.

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[34] M.R. 225/091 [hereinafter "Legal Aid Regulation"].

[35] R.S.C. 1985, Chap. C-46 [hereinafter *Criminal Code*].

[36] Section 14, *The Legal Aid Services Society of Manitoba Act*.

3.1. Charter-Based Rights to Government Funded Legal Assistance

3.1.1. Overview

The courts have not found that the *Charter* obliges governments to provide a legal aid program. However, they have found on a case-by-case basis that the constitutional right to a fair hearing when an individual confronts the government in court in certain kinds of cases may encompass an obligation on the government to fund or provide a lawyer for that person if he or she is unable to pay for one. This obligation arises in cases engaging either section 7 of the *Charter* (the right to life, liberty, or security of the person) or section 11(d) (the right to be presumed innocent until proven guilty when charged with an offence). The cases decided to date have found that this obligation extends to sufficiently complex criminal prosecutions and child protection proceedings, where the interests at stake are serious and the person would not be capable of effectively presenting his or her legal case without the assistance of a lawyer.[39]

While a number of recent cases in this area have arisen in the context of disputes about the adequacy of legal aid remuneration[40], these cases are not viewed by the courts as challenges to the provincial legal aid system, legislation, tariff or policies and the courts will not intervene in these directly. As Justice Steel stated in *Winnipeg CFS v. J.A*, a child protection matter in which the applicant directly challenged the adequacy or fairness of the legal aid program in Manitoba:[41]

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[37] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[38] S.C. 2002, c. 1 [hereinafter YCJA].

[39] Please see the leading Supreme Court of Canada decision on this issue: *New Brunswick (Minister of Health and Community Services)* v. *G.(J.)*, [1999] 3 S.C.R. 46 (hereinafter *New Brunswick v. G.(J.)*), particularly para. 2.

[40] It is important to mention here the Saskatchewan case of *R. v. Fisher*, [1997] S.J. No. 530. In the context of Legal Aid funding disputes in Manitoba and elsewhere, some individuals have attempted to use this case as a basis for a variety of types of claims throughout the country: claims to payment of legal fees over and above the legal aid rate both where the individual was and was not financially eligible for legal aid; claims to have a particular lawyer appointed; and claims challenging the constitutionality of the legal aid scheme. Called "Fisher" applications, these attempts were all ultimately unsuccessful. It is important to recognize that *Fisher* was an anomaly. In the unique circumstances of that case, the judge found that for the accused, Larry Fisher, to have a fair trial, a certain lawyer had to be appointed. The unique circumstances were that David Milgaard had been wrongfully convicted of Gail Miller's death, that the Supreme Court of Canada held a reference into the death and Milgaard's conviction, that Larry Fisher was a witness at the reference and that this lawyer had represented Fisher at the reference (See: *Fisher*, *supra*, at para. 10). The judge additionally noted that this unique combination of circumstances was unlikely to "happen again in [that] province in another thirty years" and was, as a result, of the opinion that the ruling on the application could "not set a precedent which will affect the Legal Aid Tariff" (*Fisher*, *supra* at para 20).

> I appreciate that Legal Aid funding in Manitoba is a source of much controversy at present. Governments routinely struggle with the policy choices implicit in funding decisions. However, unless those policy choices interfere with a constitutionally guaranteed right, a court cannot and should not intervene…

The parameters of these constitutional guarantees are, therefore, found in judges' rulings and take the form of principles that must be applied to each individual case in which the rights are asserted. Also, it is the provincial government that is obliged to fulfil this constitutional guarantee, not the province's legal aid program. The key principles that have emerged in these constitutional cases in recent years are summarized below.

3.1.2. Key Principles from the Cases

- **The right is to a lawyer where required for a fair court process; there is no free-standing right to legal representation in the *Charter*.**

The courts will only find that a lawyer must be provided if an individual cannot obtain a fair hearing without one and wants a lawyer but cannot obtain one on his or her own.[42]

- **The accused person, not the defence lawyer, is the one who has and exercises the right.**

Whether legal aid rates or tariffs have an unfair impact on lawyers is irrelevant to the issue of whether the government has met its constitutional obligation to provide state-funded counsel.[43]

- **The right is not a right to the lawyer of one's choice.**[44]

Nor does the *Charter* guarantee of a fair trial give one the right to have one's lawyer decide how much the government will pay.[45]

- **The right is not to "the best around", but rather to a lawyer who can provide competent representation.**[46]
- **The court cannot order the government to pay a lawyer at a particular rate.**

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[41] *Winnipeg CFS* v. *J.A.*, *supra* note 3 at para. 22.

[42] *R.* v. *Rain*, [1998] A.J. No. 1059 *Alta C.A.* (at paragraph 36) ; See also: *New Brunswick* v. *G.(J.) supra* note 39, *R. v. Tremblay*, [2003] A.J. No. 92 (C.A.)

[43] *Winnipeg Child and Family Services v. J.M.A. and C.NC. and T.R.* (11 March 2003), CP95-01-06666 (Winnipeg)(Man.Q.B.)) [hereinafter *Winnipeg CFS* v. *J.A, C.N.C. and T.R.*] at 21 and 22: *R. v. Cai* [2002] A.J. No. 1521 [hereinafter *Cai*]at paras. 25 and 26

[44] *Winnipeg CFS* v. *J.A.* (C.A.) *supra* note 3 at para. 40; *R.* v. *Drury*, [2000] M.J. No. 457 (Man. C.A.) at paras 52 - 53; *R.* v. *Grant*, [2003] M.J. No. 403 (Q.B.) at para. 21; *R.* v. *Zurowski*, [2002] M.J. No. 315 (Q.B.) at paras. 10-12 and 17.; and *Panacui* v. *Legal Aid Society of Alberta* (1987), 40 C.C.C. (3d) 459 (Alta. Q.B.) at 466.

[45] *Drury*, *supra* note 44 at paras. 52 - 53. *Zurowski*, *supra* note 44 at para. 12.

[46] *Cai*, *supra* note 43 at para. 18. *Grant*, *supra* note 44 at para. 9; *Drury*, *supra* note 44 at para. 52; *R. v. R.C.*, [2003] Q.J. 7541 (C.A.).

The *Charter* allows the courts to do one of two things where the lack of a lawyer would result in an unfair trial: make an order appointing a lawyer or stay the court case (i.e. put it on hold), until a lawyer is provided by the government. The government may fulfil its obligations "through whatever means the government wishes, be it through the Attorney General's budget, the consolidated funds of the province, or the budget of the legal aid system, if one is in place."[47]

Manitoba courts have repeatedly rejected suggestions that the courts can order specific remuneration of a lawyer as a remedy. As Justice Stefanson stated in *Winnipeg CFS v. J.A., C.N.C. and T.R., supra*[48]:

> ......The government will determine the amount that lawyers in private practice are paid by Legal Aid in Manitoba, not judges. It is the legislative and executive branches of government who determine how the taxpayers' dollars are spent, not the courts. In this case, the courts can rule that governments have particular constitutional obligations but the court does not determine how the government will fulfil those obligations.
>
> Parties simply cannot use every grievance or unfairness which may be argued to exist in the operation of the justice system as the basis for a *Charter* challenge unless those issues are causally connected to a particular breach under the *Charter*.

3.2. Statutory Rights to Government-Funded Legal Assistance

Not only does the Constitution require provincial governments to fund legal assistance in appropriate cases, one section of the *Youth Criminal Justice Act* and a number of provisions in the *Criminal Code* also require provinces to fund legal assistance in certain circumstances, even where the accused person is financially ineligible for legal aid.

3.2.1. The Youth Criminal Justice Act

Section 25 of the *Youth Criminal Justice Act* creates an explicit right to publicly funded legal advice and representation for young people charged with criminal offences under that Act. This provision continues the right that was originally established in 1984 under s. 11 of the *Young Offenders Act*[49]. Publicly funded assistance is mandatory if the young person requests it. The provision requires that any young person who needs a lawyer first be referred to legal aid. If he or she is not eligible for legal aid and requests legal assistance, the court must direct that a lawyer be appointed, which will be at the Attorney General's expense. Even in the absence of such a request, the court has the discretion to give this direction. Subsection 25(1) makes it clear that the right extends to every stage of judicial proceedings under the Act. However, nothing in the section gives a young person the right to choose his or her own lawyer if provided for by the government.

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[47] Per Justice Lamer in *New Brunswick* v. *G.(J.), supra* note 39 at para. 101.

[48] *Supra* note 43 at paras. 25 to 26; See also: *Drury supra* note 44 at paras. 18 and 19; *R.* v. *Sand*, [2003] M.J. No. 149 (Q.B.) at paras. 43 and 49.

[49] R.S.C. 1985, c. Y-1.

3.2.2. Criminal Code

A number of *Criminal Code* provisions similarly establish a right to state-funded legal representation in certain cases. These are briefly listed below:

- Proceedings relating to accused persons with mental disorders

Section 672.24 states that the court must order that a lawyer be provided for a self-represented accused where it has "reasonable grounds to believe that an accused is unfit to stand trial". Unfit to stand trial means that the person does not have the mental capacity that would be required to defend him or herself and to make decisions with the advice of a lawyer for this purpose in a criminal trial. Where such an individual is not eligible for legal aid, any legal fees that he or she cannot afford to pay must be paid by the provincial Attorney General.

Section 672.5(8) similarly directs that a court or a review board conducting a hearing to decide the disposition for a person found unfit to stand trial or not guilty by reason of mental disorder shall appoint a lawyer to represent a self-represented accused if he or she has been found unfit to stand trial or if the interests of justice require such an appointment. Subsections (8.1) and (8.2) likewise provide that the provincial Attorney General must cover any legal fees and disbursements that cannot be paid by the accused.

- Criminal appeals

Section 684(1) provides that the appeal court or one of its judges may assign a lawyer to represent a self-represented accused in an appeal to a provincial court of appeal "where, in the opinion of the court or judge, it appears desirable in the interests of justice that the accused should have legal assistance and where it appears that the accused has not sufficient means to obtain that assistance". Subsection (2) provides that the Attorney General who is the other party in the appeal must pay the costs if the accused is ineligible for legal aid. Case law under this section has established that it does not create an automatic right to state-funded counsel, nor does it establish a right to a lawyer of one's choice at the rate one wishes. Also, an individual who refuses legal aid will not be eligible.[50] In exercising this discretion, courts first assess whether the appeal has merit and then apply a similar analysis of the complexity of the case and the ability of the accused to represent him- or herself to that which applies in a constitutional claim to state-funded counsel for a trial.[51]

Parallel rights are established for appeals to the Supreme Court of Canada (section 694. 1) and from summary convictions (section 839).

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[50] See: *R. v. Johal* (1998), 127 C.C.C. (3d) 273 (B.C.C.A. - Ch'rs.)

[51] *See: Re: Baig and the Queen (1990)*, 58 C.C.C. (3d) 156; *R. v. Weismiller*, [1994] B.C.J. No. 2656, *R. v. Bernardo* (1997), 12th C.R. (5th) 310.

3.3. The Provincial Government's Obligations under the Federal-Provincial Contribution Agreement Respecting Legal Aid

The Government of Canada has recognized that it shares responsibility for legal aid in criminal matters given its constitutional responsibility for enacting criminal law and its obligation under the *Canadian Charter of Rights and Freedoms* to ensure that people accused of crimes have legal representation. On this basis, the federal government has considered funding for criminal legal aid as a priority and has contributed to the costs of criminal legal aid in the provinces and territories through a series of contribution agreements with them.[52]

Currently, the federal government contributes to the cost of criminal, youth and immigration/ refugee legal aid incurred by Manitoba (as by other provinces) under a three-year "Agreement respecting Legal Aid in Criminal Law, *Youth Criminal Justice Act*, and Immigration and Refugee Matters". The agreement's term is from April 1, 2003 to March 31, 2006. In order to receive federal funding for legal aid in these areas of law, Manitoba must abide by its obligations under the agreement. As a minimum, when providing services funded under the agreement, priority must given to cases involving the following:

- any federal offence (whether contained in a statute or a regulation), where "in the opinion of the provincial legal aid delivery entity, there is a reasonable likelihood that upon conviction, there will be a sentence of open or closed custody or imprisonment"[53]
- proceedings under Part XX.1 of the *Criminal Code* (accused with mental disorders), or under the *Extradition Act* or the *Fugitive Offenders Act*
- an appeal by the Crown in any of the above matters
- an appeal by the accused in any of the above matters, where, in the opinion of the provincial legal aid entity, the appeal has merit
- "any proceedings involving a young person in respect of a serious offence" contrary to federal legislation or regulation or under the *Extradition Act* or the *Fugitive Offenders Act*, including an appeal by the Crown. "Serious offence" is not defined in the agreement.

Provinces may, however, authorize criminal or youth criminal justice legal aid over and above the minimum requirements. Immigration and refugee matters are also cost shared under this agreement with Manitoba, as a participating province. There are no stated restrictions or priorities as regards the immigration cases that are to be funded.

The agreement provides that Manitoba shall determine its own financial criteria for determining an applicant's eligibility for legal aid, but that this must include an analysis of undue financial hardship. Undue financial hardship is defined as "an individual or his or her dependants being required to incur heavy indebtedness or being required to dispose of modest necessary assets".

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[52] http://canada.justice.gc.ca/en/ps/pb/legal_aid.html Justice Canada Website "Legal Aid".

[53] Under the agreement, the province (or its legal aid entity) assesses whether or not it is likely that upon conviction there will be a sentence of custody or imprisonment; however a list of factors to consider is suggested in an appendix to the agreement.

3.4. Legal and Policy Context Summary

1. A person may have a right to state-funded counsel not only under Manitoba's legal aid plan, but also under other entitlements set out in Canada's Constitution and federal criminal legislation.
2. Manitoba's legal aid plan differs from these other entitlements in that it covers a broader range of cases and it allows the client to choose his or her lawyer unless the Board decides otherwise. However, only those who have sufficiently low incomes will be eligible.
3. Choice of counsel is not any counsel, however, but rather choice from among those lawyers who are willing to provide services for the legal aid tariff of fees.
4. The other entitlements set out in Canada's Constitution and federal criminal legislation will come into play when a person with the right type of criminal or child protection case is financially ineligible for legal aid, but continues to be unable to afford a lawyer.
5. These entitlements do not include a right of any kind to choose one's lawyer.
6. While these entitlements do not arise from the *The Legal Aid Services Society of Manitoba Act*, the Attorney General may, nonetheless, use Legal Aid Manitoba as the vehicle to retain counsel to meets its obligations.
7. In such cases, there is no right of choice of counsel.

4. Eligibility and Coverage

In this section the review describes who is eligible for legal aid, what services the legal aid plan covers and how these aspects of the plan compare with other plans across Canada.

4.1. Financial Eligibility

4.1.1. Introduction

Legal aid is provided to those individuals and organizations that are financially unable to secure legal services from their own resources. Legal aid is, however, available only to those who meet certain eligibility criteria. Across Canada, there are a variety of criteria based on differing ideas and definitions of what it is to be economically disadvantaged

Spyridoula Tsoukalas and Paul Roberts of the Canadian Council on Social Development (CCSD) produced an unpublished report based on their research on the differences in financial eligibility across Canadian provinces. A summary overview of the results of their research is presented in this section.[54]

A detailed analysis of financial eligibility criteria in Manitoba is presented first, followed by those applied in other provinces. This section concludes with a description of how the Manitoba plan fares when compared to other plans in Canada.

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[54] S. Tsoukalas, & P. Roberts, . *Legal Aid Eligibility and Coverage in Canada – unpublished.* (Ottawa: Canadian Centre for Social Development, 2002). [hereinafter Tsoukalas and Roberts].

4.1.2. Financial Eligibility in Manitoba

Financial eligibility for legal aid in Manitoba is determined primarily through the use of financial guidelines and consideration of an applicant's assets and liabilities. If, however, an applicant has any means that would enable him or her to fund the legal action, the applicant may be deemed to be financially ineligible for legal aid. The income guidelines for eligibility are established using family income and family size.

Financial eligibility is defined by the Legal Aid Manitoba Board of Directors and is not set out in the regulations of *The Legal Aid Services Society of Manitoba Act*. They are guidelines and as such, can be flexible. Any changes to the guidelines do, however, have a considerable cost impact to Legal Aid Manitoba.

An applicant who is on social assistance or in receipt of some form of income assistance is considered to be eligible for legal aid without having to make a financial contribution towards their legal costs.

The Legal Aid Board of Manitoba adopted its current guidelines as outlined in Table 4.1 below, effective August 1, 2000. These guidelines are based on 1994 Statistics Canada Low Income Cut-offs (LICO) levels – an indicator viewed by many social researchers as a poverty line. The last time Legal Aid Manitoba changed its guidelines was ten years earlier - in March of 1990.

Table 4.1

	Gross Income		
Family Size	Fully Eligible	Eligible - Partial Contribution	Eligible - Full Contribution
1	$14,000	$16,000	$23,000
2	$18,000	$20,000	$27,000
3	$23,000	$25,000	$31,000
4	$27,000	$29,000	$34,000
5	$31,000	$33,000	$37,000
6	$34,000	$36,000	$40,000
7+	$37,000	$39,000	$43,000

An applicant is eligible for legal aid in one of three ways. They may be eligible without having to pay anything if their income is at or below the "fully eligible" level. The alternatives of "partial contribution" and "full contribution" are described in the next section.

4.1.2.1. Expanded Eligibility through Contributions

Persons making more than the "fully eligible" guidelines may still be eligible for legal aid. The plan takes into consideration other factors, including the following:

- whether or not the applicant can retain counsel without having to dispose of his or her principal place of residence;
- whether or not the applicant can retain counsel without having to dispose of assets necessary to maintain his or her livelihood;

- the applicant's assets and liabilities;
- the merit and quantum of the case;
- the cost of the proceeding;
- whether or not a reasonable person who had to pay a lawyer would spend the money to advance the case;
- whether the client is responding to or initiating an action.

Applicants whose income exceeds the fully eligible income cut-off for a family of their size, but whose income falls below the partial contribution cut-off, are eligible for legal aid. They will, however, be asked to pay a fixed part of the costs of the case (a partial contribution), usually through fixed monthly payments.

Applicants whose income exceeds the cut-off for a partial contribution, but whose income is below the cut-off for full contribution, are eligible to receive legal aid services at legal aid's cost plus an administration fee (full contribution). In such a case, the applicant signs an agreement with the legal aid program to pay in monthly installments. The client benefits by receiving a reduced rate on the lawyer's services. This program is aimed primarily at the working poor.

For the expanded eligibility program in its entirety, there is discretion in determining the amount of a partial contribution and the rate of repayment. As security for agreements, Legal Aid Manitoba may impose a charge on the land to recover full costs of the proceedings when the land is eventually sold.

4.1.2.2. Family Definition

The definition of family is based on the criterion of family size - from one to seven or more persons. Legal Aid Manitoba does not distinguish between children and adults for determination of family size.

The basis for this definition is contained in section 14 of the *Legal Aid Regulation*, which provides that in determining eligibility, Legal Aid Manitoba shall consider and may investigate the financial resources and the indebtedness of an applicant "and of persons dependent on or contributing to the support of the applicant."

4.1.2.3. Income Definition

The guidelines use gross income which includes wages and salaries, tips, gratuities, bonuses, interest payments, annuities, pension income, rental income, and income from farming. Income excluded from eligibility calculations includes the child tax benefit, day-care and maintenance payments. Common-law relationships are treated as a family unit for the purposes of determining financial eligibility. They are deemed to be parties living together as married in a relationship of some permanence, with an actual or reasonable expectation of some financial support or contribution.

4.1.2.4. Asset Test

There are a series of definitions about when and which assets can be used. All types of assets are assessed. The Society can request that any assets be liquidated, as long as it does not cause hardship to the family. This means that Legal Aid Manitoba assesses the applicant's liabilities and expenses in the process.

Legal Aid Manitoba generally looks to the individual's family unit first for resources, including assets, to cover the cost of counsel for the individual and the family unit. Under some circumstances, assets of the extended family will also be considered, for example in cases where there was on-going support from the extended family or the individual's lifestyle is based on support from the extended family. An applicant's home, property and assets are assessed, and, depending on the amount of equity, Legal Aid Manitoba may ask the applicant to liquidate the assets to cover their legal costs. It all depends on how "modest" the asset is considered to be.

A brief summary of financial eligibility guidelines for all Canadian provinces, as well as a comparison and contrast of the plans, is provided in Appendix E.

4.1.3. How Does Manitoba's Eligibility Compare with Other Provinces?

What becomes apparent after reviewing the plans from across Canada is that, despite the cautions that must be exercised in comparing jurisdictions due to many factors (particularly the fact that discretion exists in almost all the plans), Manitoba's financial eligibility guidelines appear easier to meet than those in the majority of other provinces. The support for this conclusion is presented below.

- Among the provinces using gross income as their criteria for income, Prince Edward Island has the highest income guidelines for full and automatic eligibility ($14,885) using a one-person family as the comparison, followed very closely by Manitoba with $14,000. Similarly, for two and three person families, Manitoba has the second highest income cut-off when compared with the other provinces using gross income and specifying maximum income levels – Prince Edward Island, Alberta, Quebec and Nova Scotia.

- The asset test used in Manitoba is more generous when compared to other Canadian provinces. In all jurisdictions, an applicant can have some liquid assets, with ranges from $1,500 for an individual in Saskatchewan, to a $5,000 maximum in Manitoba.

- Manitoba has established a unique partial and full contribution eligibility program that was created specifically to help low-income families that are "near poor" or "working poor." A 1991 evaluation by Prairie Research Associates of Manitoba's expanded eligibility concluded that the program was a success, and that the program was fulfilling its purpose of meeting the needs of the working poor.[55] In those provinces that do not allow for client contributions, individuals in need of legal assistance would either have to represent themselves or try to find legal counsel on their own. The program also received recognition as superior to others from the National Council on Welfare.[56] In addition, Tsoukalas and Roberts pointed out that the four provinces (one of which is Manitoba) with enhanced eligibility programs demonstrated a significant increase in the proportion of families as well as low-income 18 to 35 year-olds who would be eligible for legal aid in each province – an indicator of access to justice for low-income families in Canada. The authors do, however, caution that it is uncertain whether the contributions place them in situations of financial hardship, or act as a deterrent.[57]

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[55] Justice Canada. *Evaluation of the Legal Aid Manitoba Expanded Eligibility Project Summary Report* (July 1991). Working Document. WD1991-14a (*this is a summary of the evaluation study conducted for the Department of Justice by Prairie Research Associates in association with Coopers and Lybrand Consulting Group and Professor Rick Linden, University of Manitoba.) [hereinafter Expanded Eligibility Report]

- Research conducted by Tsoukalas and Roberts found that Manitoba ranks above average after comparing financial eligibility guidelines to Statistics Canada Low Income Cut-offs (LICO) levels and then calculating the proportion of poor families who qualify for legal aid by province.[58] As illustrated in the Charts 4.1 and 4.2 below, sixty percent of poor families fully qualify for legal aid in Manitoba, while almost 100 percent of poor families qualify with the expanded eligibility program Manitoba offers. Similarly, seventy percent of low-income 18 to 35-year-olds fully qualify for legal aid in Manitoba, while 98 per cent of these persons qualify with the expanded eligibility program Manitoba offers.

- Manitoba's decision to base financial eligibility guidelines on LICO levels is appropriate from a social justice perspective because it is accepted by many social researchers as a poverty line. In contrast, Saskatchewan for example is one jurisdiction that instead bases its guidelines on the province's social assistance (or welfare) regulations. Tsoukalas and Roberts criticize the practice of basing legal aid guidelines on social assistance levels because they represent only the very poor and thus allow for a significant number of lower income families to be without viable options.[59]

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[56] After examining the various expanded eligibility programs in Canada, the National Council on Welfare in their report "Legal Aid and the Poor" provided that the only successful attempt to give low-income earners access to legal services in a non-discretionary, clear and open manner is Manitoba's Expanded Eligibility Program. See: National Council of Welfare. (1995). *Legal Aid and the Poor* (Minister of Public Works and Government Services Canada).

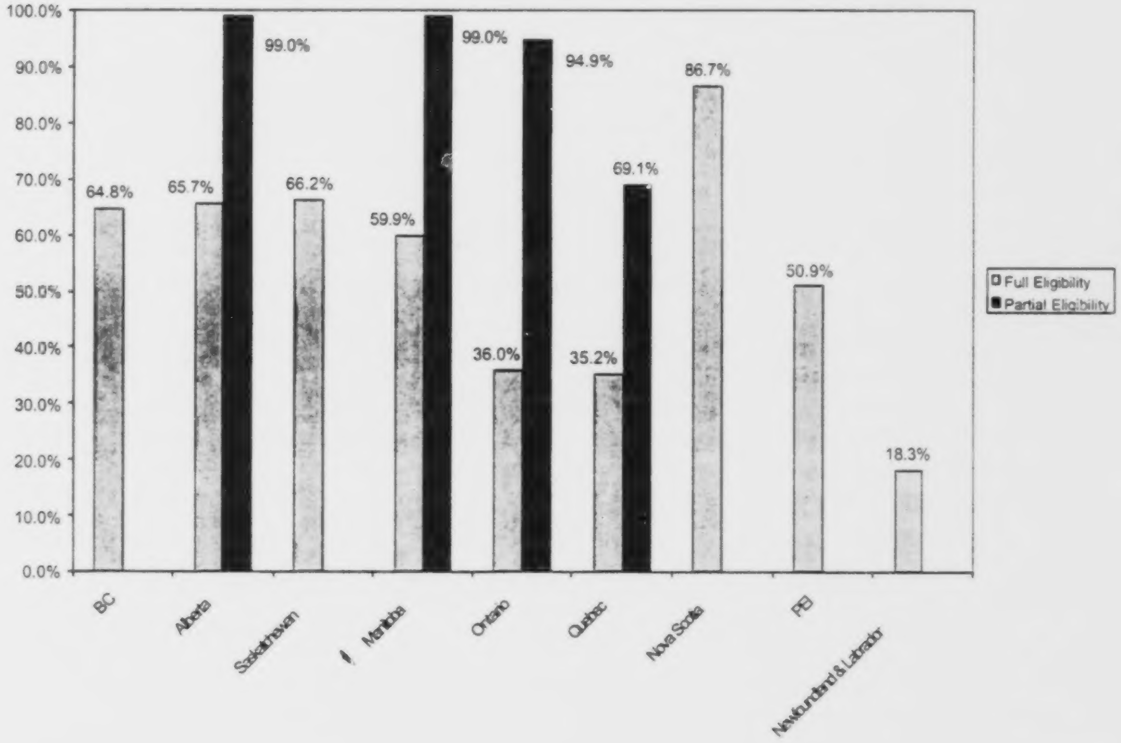
[57] Tsoukalas and Roberts, *supra* note 54 at 65 and 67.

[58] Tsoukalas and Roberts' data analyses were conducted using Statistics Canada's *Income In Canada 1999* and the *Survey of Labour and Income Dynamics* (SLID) *1998* in order to compare the financial eligibility guidelines to the LICOs, and to determine the proportion of poor that would be eligible for legal aid given the financial eligibility guidelines (income component) in the different jurisdictions. While the information on the plans themselves is current, the data analyses, because of limitations in the microdata, examines the situation in 1998. British Columbia, Alberta, Saskatchewan, Manitoba and Prince Edward Island have all updated their guidelines since that time. Moreover, Newfoundland and Labrador is in the process of updating their criteria.

[59] *Ibid.* at 65.

Chart 4.1 – Proportion of Poor Families who Qualify for Legal Aid by Province

This chart illustrates that 60 percent of poor families fully qualify for legal aid in Manitoba, while almost 100 percent of poor families qualify with the expanded eligibility program Manitoba offers.



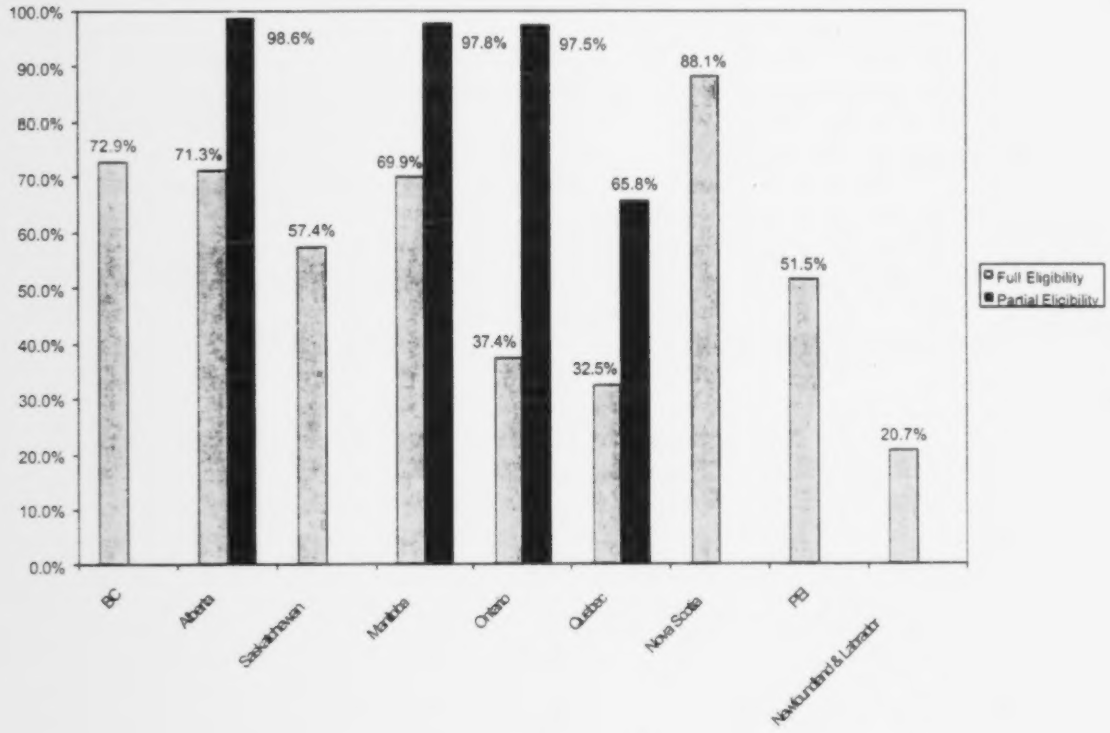
Source: S. Tsouiakas, & P. Roberts. *Legal Aid Eligibility and Coverage in Canada – unpublished.* (Ottawa: Canadian Centre for Social Development, 2002) at 64.

Note: Prepared by the CCSD using Statistics Canada's Survey of Labour and Income Dynamics microdata, 1998.

* These statistics are based solely on the income component of the guidelines found in the plans. Allowable deductions, liquid assets and liabilities are not included in the calculations. It assumes that cases would meet the substantive coverage criteria.

Chart 4.2 - Proportion of Low Income 18 to 35-year-olds who Qualify for Legal Aid by Province

This chart illustrates that 70 percent of low-income 18 to 35-year-olds fully qualify for legal aid in Manitoba, while 98 per cent of these persons qualify with the expanded eligibility program Manitoba offers.



Source: S. Tsoulakas, & P. Roberts. *Legal Aid Eligibility and Coverage in Canada – unpublished.* (Ottawa: Canadian Centre for Social Development, 2002) at 64.

Note: Prepared by the CCSD using Statistics Canada's Survey of Labour and Income Dynamics microdata, 1998.

* These statistics are based solely on the income component of the guidelines found in the plans.

4.2. Legal Aid Coverage in Manitoba

Legal aid "coverage" is the term used in this report to describe the types of cases that are eligible for funding under the provincial legal aid plans. A full description of the legislation and policy governing legal aid coverage in Manitoba is set out in Appendix D of this report. Generally speaking, if an individual demonstrates sufficient financial need and is charged with an indictable offence under Canada's *Criminal Code* or faces extradition or indefinite detention as a dangerous offender, he or she has a right to legal aid. If that same individual instead risks incarceration or losing the ability to earn a livelihood as a result of being charged with a less serious criminal or provincial offence or under a municipal bylaw, is a young offender, or needs legal assistance in a civil matter, whether it relates to family, immigration or poverty law, the legislation allows but does not require Legal Aid Manitoba to provide such assistance. Legal Aid Manitoba has endeavoured to provide full coverage for all criminal and penal matters since its inception and once provided very full coverage for all civil matters as well. Coverage in the latter area has tightened over the years, particularly for civil actions, administrative/poverty matters, and, to a lesser degree, family proceedings.

4.2.1. How Does Manitoba's Coverage Compare with Other Provinces?

A review of the provincial and territorial reports submitted to the annual meeting of the Association of Legal Aid Plans of Canada, which took place August 25 to 27, 2003, in Winnipeg[60], provides a preliminary indication that coverage under Manitoba's plan, even with the recent restrictions, continues to be more generous than the majority of provinces and territories and similar to or only slightly less generous than the remaining provinces.

Manitoba's plan appears to provide more generous coverage than the following provinces and territory:

- British Columbia -- which appears to have a more restricted scope for criminal, youth, family, and immigration, and funds no administrative/poverty or civil proceedings.
- Saskatchewan -- which appears to have a similar scope for criminal and youth, less generous coverage for family, and no coverage for civil, administrative/poverty, or immigration.
- New Brunswick -- which appears to have a more restricted scope for criminal, youth, and family and provides no coverage for civil, administrative/poverty or immigration.
- Nova Scotia -- which appears to have similar coverage for criminal and youth, less generous coverage for family and administrative/poverty cases, and no coverage for immigration.
- Prince Edward Island -- which appears to have a similar scope for criminal and youth, less generous coverage for family, and virtually no coverage for administrative/poverty and immigration.
- Yukon Territory -- which appears to have similar coverage for criminal and youth, less generous coverage for family, and no coverage for administrative/poverty.

In addition:

- Manitoba's plan appears to provide similar coverage in all areas to that of Newfoundland and Labrador.
- Manitoba's plan appears to provide similar coverage for criminal and youth, less generous coverage for civil cases, but more generous for family, administrative/poverty and immigration cases than Alberta.

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[60] Association of Legal Aid Plans of Canada, *Background Materials for Annual Meeting, August 25, 26 and 27, 2003, Winnipeg, Manitoba*, Provincial and Territorial Reports, Tab 5. As the information in these reports do not permit a detailed assessment of coverage in all cases, the findings here are presented for the purposes of a general comparison only.

- Finally, Manitoba's plan appears to provide similar coverage for criminal, youth and immigration to, but slightly less generous coverage for civil, family, administrative/poverty than, the plans in Ontario, and Quebec.

The review concludes, that notwithstanding recent difficulties, the Manitoba plan compares well with the majority of other plans in Canada on eligibility and coverage.

5. Legal Aid Funding and Expenditures

In this section the review looks at the financial history of Legal Aid Manitoba and compares funding and expenditures to other provinces. The review then looks more closely at expenditures for the Saskatchewan Legal Aid Commission as compared to Legal Aid Manitoba. Manitoba costs are often compared to Saskatchewan costs because the provinces have a relatively similar area to serve, similar populations and similar demographics.

5.1. Manitoba Fourteen Year Financial History

Appendix F sets out the financial history of the Manitoba plan from the 1990-91 fiscal year to the 2003-04 fiscal year.

An excerpt from Appendix F on funding sources is set out below in Table 5.1.

Table 5.1

Funding Sources (in Dollars)

	Federal Criminal Funding	CAP/ CHST Funding	Provincial Funding	Total Core Government Funding	Federal Project Funding	Law Foundation Grant	Client Recoveries & Other	Total Funding
1990/91	3,508,900	1,666,000	5,870,187	11,045,087	196,343	2,319,508	633,404	14,194,342
1991/92	3,712,900	1,718,000	6,421,067	11,851,967	148,281	2,188,546	711,441	14,900,235
1992/93	3,396,400	2,276,000	7,185,519	12,857,919	140,313	1,294,629	1,080,243	15,373,104
1993/94	3,463,300	2,220,300	7,398,208	13,081,808	30,000	1,085,031	1,234,545	15,431,384
1994/95	3,394,600	2,209,100	7,980,026	13,583,726	20,000	852,184	1,406,113	15,862,023
1995/96	3,451,800	1,918,600	7,693,500	13,063,900	40,000	1,202,629	1,159,040	15,465,569
1996/97	3,302,100	1,800,000	7,364,413	12,466,513	446	1,456,953	1,117,290	15,041,202
1997/98	3,303,612	1,500,000	7,960,331	12,763,943		983,569	1,749,921	15,497,433
1998/99	3,153,700	1,500,000	8,145,612	12,799,312	1,617	835,148	1,506,485	15,142,562
1999/00	3,144,600	1,500,000	9,361,890	14,006,490	1,593	1,687,438	1,722,411	17,417,932
2000/01	3,134,705	1,600,000	9,759,149	14,493,854	3,116	1,523,935	1,875,739	17,896,644
2001/02	3,500,168	1,600,000	10,193,211	15,293,379	85,732	2,088,908	1,727,496	19,195,515
2002/03	3,475,600	1,600,000	12,046,634	17,122,234	225,954	1,217,629	1,820,405	20,386,222
2003/04	3,430,469	1,600,000	14,547,531	19,578,000		810,000	1,440,000	21,828,000

Notes: CAP funding has been estimated at .00295 of the total CHST funding for the years from 1996/97 to present.

Some important points to note follow.

Legal Aid Manitoba has four main sources of funding, the provincial government, the federal government, the Law Foundation of Manitoba and client recoveries and other.

The federal government at one time funded legal aid through three agreements, Adult Criminal Legal Aid, Youth Criminal Legal Aid, and The Canada Assistance Plan (CAP) (which provided funding for family and civil legal aid). At the commencement of legal aid, federal funding came close to fifty percent of Legal Aid Manitoba's cost. Eventually, the Youth Criminal Agreement was folded into the Adult Criminal Legal Aid Agreement and CAP funding for civil legal aid for anyone at social assistance levels became part of the CHST (Canada Health and Social Transfer). In 1990/91 the federal government took steps to cap its contribution to criminal legal aid. Civil legal aid funding became difficult to identify when it became part of block funding through the CHST in 1996.

The Law Foundation of Manitoba provides funding to Legal Aid Manitoba through revenue it receives from interest generated on all Manitoba lawyers' trust accounts. While there is a minimum grant required, that minimum can be breached when the revenue received by the Foundation goes below the guaranteed amount. The province has smoothed Law Foundation annual funding fluctuations by making up any shortfall and taking advantage of any large increase in funding.

In reviewing Appendix F in its totality one can see that[61]:

- Staff has increased from 91 to 131 over the years;
- Appropriated (budgeted) provincial funding (including federal contributions) has increased from $10,476,000 to $17,160,000 (64 per cent);
- Actual provincial funding (including federal contributions) has increased from $11,045,000 to an estimated $19,399,000 (76 per cent);
- Federal funding has decreased from $5,174,900 to an estimated $5,030,469 (minus three per cent);
- Federal funding has decreased from 36 per cent of total expenditures to 23 per cent;
- Provincial funding has increased from 41 per cent of total expenditures to 67 per cent;
- Salary costs have increased from $4,081,000 to an estimated $7,827,000 (92 per cent)[62]
- Actual payments to the private bar have increased from $8,602,896 to an estimated $9,712,000 (13 per cent)[63]

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[61] All estimates provided below are based on the most current 2002/03 data available. The reviewer believes the estimates are relatively close to final figures, but they remain at this point year-end forecasts.

[62] The staff complement increased by 44 per cent over the period. In addition, staff caseloads for criminal practice increased by 46 per cent while family practice caseloads increased by five per cent. For more information, see Appendix K – Certificate and Certificate Equivalent History.

[63] There were significant decreases in private bar payments from 1996 to 2000.

- Actual total expenditures have increased from $14,200,813 to an estimated $21,828,000 (54 per cent)

It is important to note that the amounts shown do not include special funding provided for the Manitoba Warriors Trial.

In general then, total expenditures by legal aid increased over the years with some small decreases in the mid nineties.

5.2. Legal Aid Manitoba in Comparison to other Provinces

While inter-jurisdictional comparisons are fraught with difficulty because of the different delivery systems, coverage, geographic areas and other problems, they do provide a perspective that most researchers want to see.

Table 5.2 sets out the latest thirteen year expenditures available for all legal aid plans in Canada.[64] It is interesting to note that the mid nineties saw a reduction in expenditures for most of the plans. Ontario, Quebec, and British Columbia saw significant reductions while Manitoba funding tended to be more stable.

Table 5.2

Total Legal Aid Plan Expenditures
$'000

Province/Territory	1990-91	1991-92	1992-93	1993-94	1994-95	1995-96	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02	2002-03
Newfoundland & Labrador	4,708	5,802	5,508	5,080	5,728	5,731	5,545	5,524	5,674	5,900	7,608		
Prince Edward Island	504	488	569	501	523	543	593	543	595	695	736	777	853
Nova Scotia	9,716	10,378	10,527	11,052	11,189	11,064	10,599	10,111	10,965	11,117	11,031	12,993	13,178
New Brunswick	2,740	4,219	3,347	3,332	2,895	2,972	3,608	3,551	4,038	4,087	4,104	5,437	4,849
Quebec	91,992	105,323	113,680	117,079	119,546	120,641	114,238	108,856	121,180	101,943	103,208	118,196	122,882
Ontario	213,353	267,734	321,044	297,811	349,435	327,294	250,142	186,861	217,208	223,608	241,835	293,516	291,704
Manitoba	14,201	14,901	15,117	15,040	15,211	14,959	15,060	15,747	15,160	17,637	18,095	19,534	20,396
Saskatchewan	7,253	7,650	7,926	8,592	8,619	8,829	8,909	9,560	10,111	10,616	10,989	11,904	12,239
Alberta	20,031	25,987	30,410	28,350	25,519	20,957	24,445	22,342	22,903	26,142	27,215	32,438	36,670
British Columbia	42,018	65,522	88,260	100,894	101,190	102,339	96,989	85,270	80,335	83,650	87,515	89,966	71,353
Yukon Territory	913	999	1,097	1,274	1,103	1,093	887	881	1,033	1,245	1,032	1,111	1,281
Northwest Territories	4,644	4,949	4,643	5,190	5,474	5,470	5,126	5,397	5,207	6,366	3,511	3,747	3,767
Nunavut											2,836	3,499	3,920

Data Source: Canadian Centre for Justice Statistics. Legal aid in Canada: resource and caseload statistics.
The sole exception is 2002/03 Manitoba data which was taken directly from the 2003 LAM annual report because the data reported in the CCJS report - Legal Aid in Canada: resource and caseload statistics (2002/03), which was released on February 26, 2004 - differs from the annual report.

Table 5.3 sets out the per capita expenditures for the plans over the latest nine years. In these comparisons Manitoba consistently ranked third or fourth highest amongst the provinces. In 2002/03, however, Manitoba moved up to second amongst the provinces. There is difficulty in comparing and contrasting total per capita expenditures across jurisdictions, however, as they do not account for differences in coverage.

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[64] Total expenditures reported by CCJS will not agree with the total expenditures for Legal Aid Manitoba reported in Appendix F because non-cash items such as contributed services were removed from the final results in Appendix F in order to properly reflect actual funding provided by the province.

Table 5.3

Total Legal Aid Plan Expenditures
Expenditures Per Capita (Current Dollars)

Province/Territory	1994-95	1995-96	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02	2002-03
Newfoundland & Labrador	9.97	10.09	9.89	9.97	10.40				
Prince Edward Island	3.91	3.96	4.39	3.97	4.34	5.05	5.33	5.61	6.10
Nova Scotia	11.63	11.93	11.38	10.82	11.71	11.83	11.72	13.78	13.95
New Brunswick	3.86	3.95	4.79	4.71	5.36	5.42	5.43	7.18	6.41
Quebec	16.59	16.66	15.70	14.91	16.55	13.87	13.99	15.95	16.48
Ontario	32.27	29.85	22.53	16.61	19.08	19.41	20.70	24.72	24.17
Manitoba	13.53	13.24	13.28	13.85	13.32	15.44	15.79	16.99	17.72
Saskatchwan	8.54	8.71	8.74	9.35	9.86	10.35	10.75	11.72	12.10
Alberta	9.43	7.65	8.79	7.87	7.88	8.83	9.04	10.59	11.78
British Columbia	27.48	27.05	24.98	21.53	20.09	20.77	21.56	21.96	17.23
Yukon Territory	36.77	35.37	27.81	27.36	32.69	40.16	33.73	37.16	42.70
Northwest Territories	83.96	82.13	75.83	79.72	77.14	93.74	85.84	91.61	90.99
Nunavut						99.29	103.50	124.08	136.59
Total - Canada				15.45	16.65	16.26	16.94	19.42	18.51
Manitoba's Ranking Compared to Other Provinces	4	4	4	4	4	3	3	3	2

The population data used to produce the per capita figures in this table are provided by Statistics Canada, Census and Demographic Statistics, Demography Division. They represent the Canadian population as of July 1st and are final intercensal estimates for 1994 and 1995, final postcensal estimates for 1996 and 1997 and updated postcensal estimates for 1998-2000 and preliminary postcensal estimates for 2001 and 2002.

Data for 1990-91 through 1993-94 are available from CCJS but cannot be included in this comparative analysis due to data integrity issues.

Data Source: Canadian Centre for Justice Statistics. Legal aid in Canada: resource and caseload statistics.
The sole exception is 2002/03 Manitoba data which was taken directly from the 2003 LAM annual report because the data reported in the CCJS report - Legal Aid in Canada: resource and caseload statistics (2002/03), which was released on February 26, 2004 - differs from the annual report.

A more meaningful comparison is the cost per capita of delivering criminal legal services. This comparison tends to reduce the impact of different coverage as almost all plans deliver the same minimum criminal legal aid services. Table 5.4 sets out the per capita expenditures on criminal legal aid for the plans over the latest nine years. In these comparisons Manitoba ranked fourth highest amongst the provinces for per capital criminal expenditures in the two most recent fiscal years, but the ranking has been quite variable – with a high of second and a low of seventh – when one looks back to 1994-95.

Table 5.4

Total Legal Aid Plan Expenditures
Expenditures Per Capita for Criminal Matters (Current Dollars)

Province/Territory	1994-95	1995-96	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02	2002-03
Newfoundland & Labrador	6.18	6.21	5.79	6.07	6.40				
Prince Edward Island	2.98	3.04	3.41	2.89	2.77	3.58	3.80	3.95	4.03
Nova Scotia	5.75	5.57	5.40	5.15	5.65	5.80	5.83	6.54	6.90
New Brunswick	2.03	2.35	2.36	2.23	2.57	2.64	2.49	3.21	3.25
Quebec	5.25	5.03	4.75	4.85	4.47	4.40	4.50	5.53	5.73
Ontario	11.82	10.97	8.25	7.01	6.85	7.19	7.21	8.20	8.20
Manitoba	5.72	5.86	4.99	5.92	4.88	5.55	7.82	7.30	7.29
Saskatchewan	5.13	5.26	5.16	5.28	5.65	6.14	6.36	7.33	7.66
Alberta	5.64	4.29	5.08	4.39	4.45	4.70	5.15	5.55	6.23
British Columbia	10.54	10.02	9.44	7.98	7.57	7.80	7.91	8.06	7.91
Yukon Territory	24.00	17.18	15.71	15.03	20.98	23.16	20.39	20.17	24.10
Northwest Territories				22.91	11.59	11.51	11.71	9.76	not available
Nunavut							6.50	30.82	53.52
Total - Canada				6.09	5.88	5.98	6.16	6.92	not available
Manitoba's Ranking Compared to Other Provinces	5	4	7	4	6	5	2	4	4

The population data used to produce the per capita figures in this table are provided by Statistics Canada, Census and Demographic Statistics, Demography Division. They represent the Canadian population as of July 1st and are final intercensal estimates for 1994 and 1995, final postcensal estimates for 1996 and 1997 and updated postcensal estimates for 1998-2000 and preliminary postcensal estimates for 2001 and 2002.

Data for 1990-91 through 1993-94 are available from CCJS but cannot be included in this comparative analysis due to data integrity issues.

Data Source: Canadian Centre for Justice Statistics. Legal aid in Canada: resource and caseload statistics.
The sole exception is 2002/03 Manitoba data which was taken directly from the 2003 LAM annual report because the data reported in the CCJS report - Legal Aid in Canada: resource and caseload statistics (2002/03), which was released on February 26, 2004 - differs from the annual report.

Tables 5.5 and 5.6 go on to present per capita civil costs and per capita administration costs respectively. When examining total civil expenditures per capita, Manitoba has consistently ranked fourth or fifth highest amongst the provinces. When examining total central administration expenditures per capita, Manitoba has consistently ranked second or third highest amongst the provinces.

While differences in civil expenditures can likely be attributed to differences in coverage, the review was unable to account for what appear to be Manitoba's high administration costs when compared to the other provinces.

Table 5.5

Total Legal Aid Plan Expenditures
Expenditures Per Capita for Civil Matters (Current Dollars)

Province/Territory	1994-95	1995-96	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02	2002-03
Newfoundland & Labrador	3.78	3.88	4.10	3.90	4.01				
Prince Edward Island	0.93	0.99	0.95	0.96	0.94	0.86	0.94	1.65	2.07
Nova Scotia	5.27	5.55	5.32	4.95	5.29	5.07	4.92	5.51	5.65
New Brunswick	0.91	0.82	1.74	1.78	1.78	1.82	2.14	1.64	2.11
Quebec	9.97	10.33	9.55	8.33	7.98	8.12	8.10	9.03	9.28
Ontario	16.61	15.11	10.52	6.17	8.65	7.87	8.87	10.33	10.94
Manitoba	5.82	5.42	6.12	5.39	6.14	6.43	4.56	6.04	6.32
Saskatchwan	2.77	2.80	2.96	3.28	3.36	3.33	3.25	3.53	3.57
Alberta	2.69	2.25	2.70	2.46	2.38	3.04	2.78	3.92	4.33
British Columbia	14.26	14.50	13.07	11.40	10.51	10.74	11.29	11.44	7.19
Yukon Territory	6.37	6.05	4.89	6.09	4.21	7.19	5.26	8.80	9.87
Northwest Territories				12.39	10.56	15.61	15.43	16.97	not available
Nunavut							1.28	10.50	31.11
Total - Canada				6.71	7.46	7.23	7.58	7.58	not available
Manitoba's Ranking Compared to Other Provinces	4	5	4	4	4	4	5	4	4

The population data used to produce the per capita figures in this table are provided by Statistics Canada, Census and Demographic Statistics, Demography Division. They represent the Canadian population as of July 1st and are final intercensal estimates for 1994 and 1995, final postcensal estimates for 1996 and 1997 and updated postcensal estimates for 1998-2000 and preliminary postcensal estimates for 2001 and 2002.

Data for 1990-91 through 1993-94 are available from CCJS but cannot be included in this comparative analysis due to data integrity issues.

Data Source: Canadian Centre for Justice Statistics. Legal aid in Canada: resource and caseload statistics.
The sole exception is 2002/03 Manitoba data which was taken directly from the 2003 LAM annual report because the data reported in the CCJS report - Legal Aid in Canada: resource and caseload statistics (2002/03), which was released on February 26, 2004 - differs from the annual report.

Table 5.6

Total Legal Aid Plan Expenditures
Expenditures Per Capita for Central Administration (Current Dollars)

Province/Territory	1994-95	1995-96	1996-97	1997-98	1998-99	1999-00	2000-01	2001-02	2002-03
Newfoundland & Labrador	0.00	0.00	0.00	0.00	0.00				
Prince Edward Island	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
Nova Scotia	0.55	0.76	0.60	0.67	0.77	0.95	0.94	1.45	1.30
New Brunswick	0.80	0.66	0.69	0.70	1.01	0.96	0.78	0.87	1.01
Quebec	1.26	1.20	1.26	1.61	3.98	1.25	1.26	1.28	1.35
Ontario	3.28	3.20	3.20	2.91	3.04	3.56	3.76	5.07	4.67
Manitoba	1.69	1.62	1.78	2.20	1.93	2.99	2.98	3.19	3.49
Saskatchwan	0.63	0.64	0.62	0.80	0.86	0.88	1.15	0.75	0.82
Alberta	1.10	1.10	1.02	1.03	1.05	1.09	1.11	1.07	1.16
British Columbia	2.20	2.03	2.00	1.77	1.60	1.79	1.89	1.82	1.59
Yukon Territory	6.37	12.10	7.21	6.24	7.50	9.81	8.07	8.39	8.73
Northwest Territories				20.22	31.61	24.56	13.30	16.89	13.82
Nunavut							55.84	28.44	39.48
Total - Canada				2.02	2.65	2.23	2.37	2.85	2.68
Manitoba's Ranking Compared to Other Provinces	3	3	3	2	3	2	2	2	2

The population data used to produce the per capita figures in this table are provided by Statistics Canada, Census and Demographic Statistics, Demography Division. They represent the Canadian population as of July 1st and are final intercensal estimates for 1994 and 1995, final postcensal estimates for 1996 and 1997 and updated postcensal estimates for 1998-2000 and preliminary postcensal estimates for 2001 and 2002.

Data for 1990-91 through 1993-94 are available from CCJS but cannot be included in this comparative analysis due to data integrity issues.

Data Source: Canadian Centre for Justice Statistics. Legal aid in Canada: resource and caseload statistics.
The sole exception is 2002/03 Manitoba data which was taken directly from the 2003 LAM annual report because the data reported in the CCJS report - Legal Aid in Canada: resource and caseload statistics (2002/03), which was released on February 26, 2004 - differs from the annual report.

5.3. Financial Summary - General

Manitoba funding has held up well on a comparative basis with other provinces. Manitoba's criminal expenditures per capita are not out of line with other provinces, while Manitoba's higher than average civil expenditures per capita reflect the breadth and scope of Manitoba's civil legal aid program. Moreover, even though Manitoba has faced the same pressures as the other provinces such as federal funding cuts and balanced budget pressures, it is notable that Manitoba has not made the same degree of drastic funding reductions as have been made in some other provinces. Manitoba's administration costs do, however, appear to be high when compared to other provinces. As a result, the review recommends further analysis of Legal Aid Manitoba's administrative costs.

5.4. Manitoba and Saskatchewan

Because Manitoba is often compared to Saskatchewan, the review examined these two plans in more detail. The provinces have a relatively similar area to serve, similar populations and similar demographics.[65] One core difference, however, is that Manitoba has one large urban centre while Saskatchewan's population is more dispersed. This has resulted in differences in the number as well as the selection of host communities for legal aid offices in the provinces. To illustrate the difference, Saskatchewan has thirteen Legal Aid offices whereas Manitoba has established four community law centres providing generalized service in Brandon, Dauphin, The Pas and Thompson and five law offices in Winnipeg (Family Law, Criminal Law, Child Protection, Aboriginal, and the University Law Centre). Another difference to note is the degree of specialization in the provinces. In Saskatchewan Legal Aid, lawyers have mixed practices (that is they work on both criminal and family cases), while in Winnipeg, lawyers work either in criminal or family law.

Because Saskatchewan uses a staff lawyer system and Manitoba uses a mixed model, differences in cost are often attributed to the different delivery models.

The following charts (Charts 5.1 and 5.2) compare, first, the per capita amount of legal aid expenditures, and then the per capita amount on criminal legal aid expenditures. Two additional charts are then presented (Charts 5.3 and 5.4) – per capita expenditures on civil legal aid, and then, per capita expenditures on central administration.

As can be seen in the four charts, the total per capita expenditures suggest a substantial difference (Manitoba's average is $14.80 while Saskatchewan's average is $10.01), whereas the per capita amount on criminal expenditures alone show more convergence and at times, Saskatchewan is higher (Manitoba's average is $6.15 while Saskatchewan's average is $6.00). Manitoba's per capita expenditures on civil legal aid as compared to Saskatchewan shows Manitoba significantly higher in spending, (Manitoba's average is $5.80 while Saskatchewan's average is $3.20), likely due in large measure to the additional civil coverage provided in Manitoba when compared to Saskatchewan. Consistent with earlier analysis on administration costs, Manitoba's per capita expenditures on central administration are significantly higher than those in Saskatchewan (Manitoba's average is $2.43 while Saskatchewan's average is $0.79). This can be explained to some degree, however not completely, by Manitoba's mixed model of service delivery. There are additional costs to administer a private bar payment system. Manitoba also provides an expanded eligibility plan, which has related administrative costs. Nonetheless, as previously noted, Manitoba's administration costs appear to be high.

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[65] Statistics Canada population estimates for each province are as follows. Manitoba's population in 2002-03 was 1,150,800 while Saskatchewan's population was 1,011,800. See: CCJS, *Legal Aid in Canada Resource and Caseload Statistics 2002-03*, at 76.

Chart 5.1 – Total Per Capita Expenditures – Manitoba Versus Saskatchewan

This chart illustrates that there is a significant difference between Saskatchewan and Manitoba when comparing total expenditures per capita. Manitoba's average from 1994/95 to 2002/03 is $14.80 while Saskatchewan's average is $10.01.

Source: CCJS Legal aid in Canada: resource and caseload statistics. The sole exception is 2002/03 Manitoba data which was taken directly from the 2003 Legal Aid Manitoba annual report.

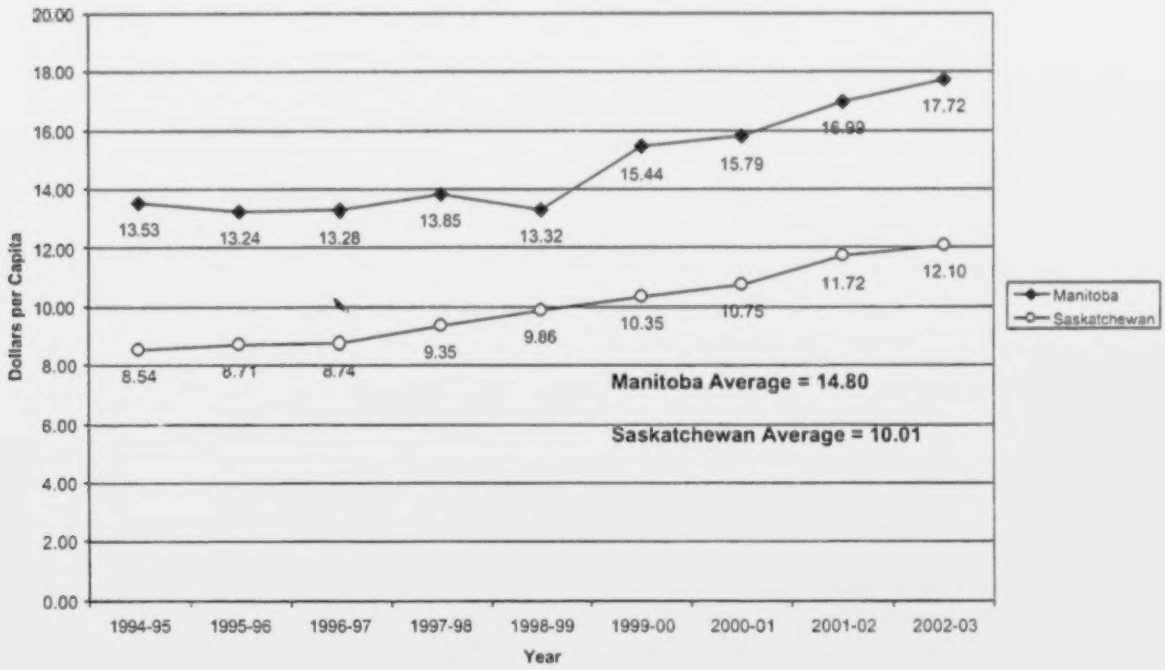


Chart 5.2 – Total Per Capita Expenditures on Criminal Matters – Manitoba Versus Saskatchewan

This chart illustrates that Manitoba and Saskatchewan's expenditures per capita on criminal matters alone are very similar and for five of the nine most current fiscal years, Saskatchewan's expenditures have been higher than Manitoba. Manitoba's average from 1994/95 to 2002/03 is $6.15 while Saskatchewan's average is $6.00.

Source: CCJS Legal aid in Canada: resource and caseload statistics. The sole exception is 2002/03 Manitoba data which was taken directly from the 2003 Legal Aid Manitoba annual report.

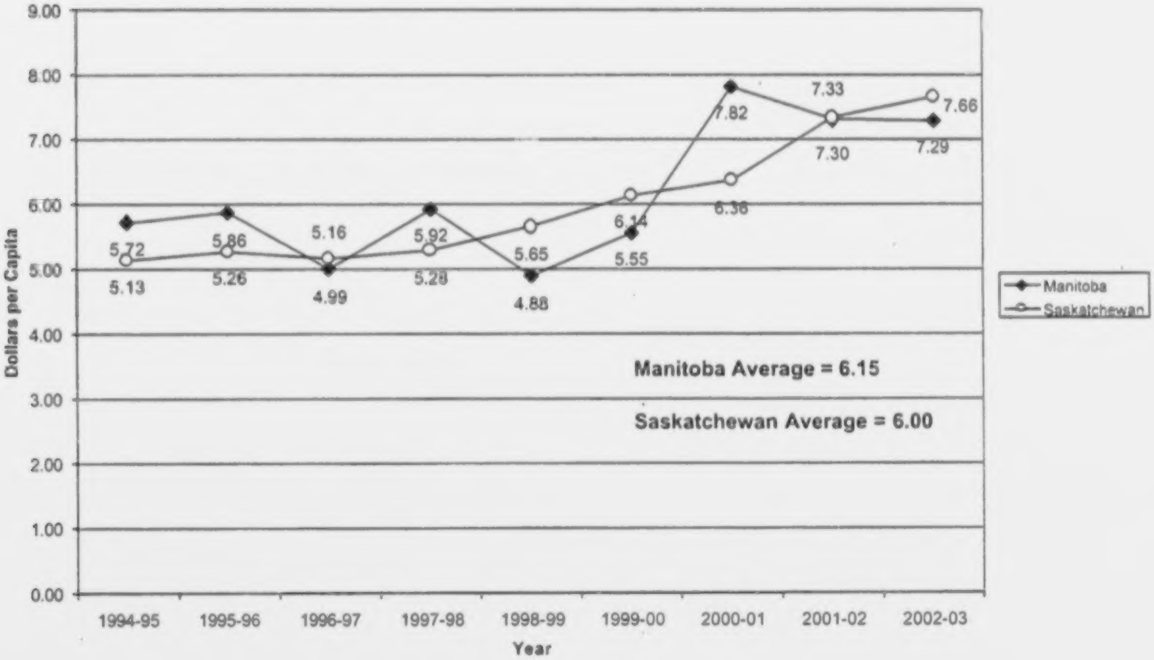


Chart 5.3 - Total Per Capita Expenditures on Civil Matters – Manitoba Versus Saskatchewan

This chart illustrates that Manitoba is significantly ahead of Saskatchewan on expenditures per capita on civil legal aid. Manitoba's average from 1994/95 to 2002/03 is $5.80 while Saskatchewan's average is $3.20.

Source: CCJS Legal aid in Canada: resource and caseload statistics. The sole exception is 2002/03 Manitoba data which was taken directly from the 2003 Legal Aid Manitoba annual report.

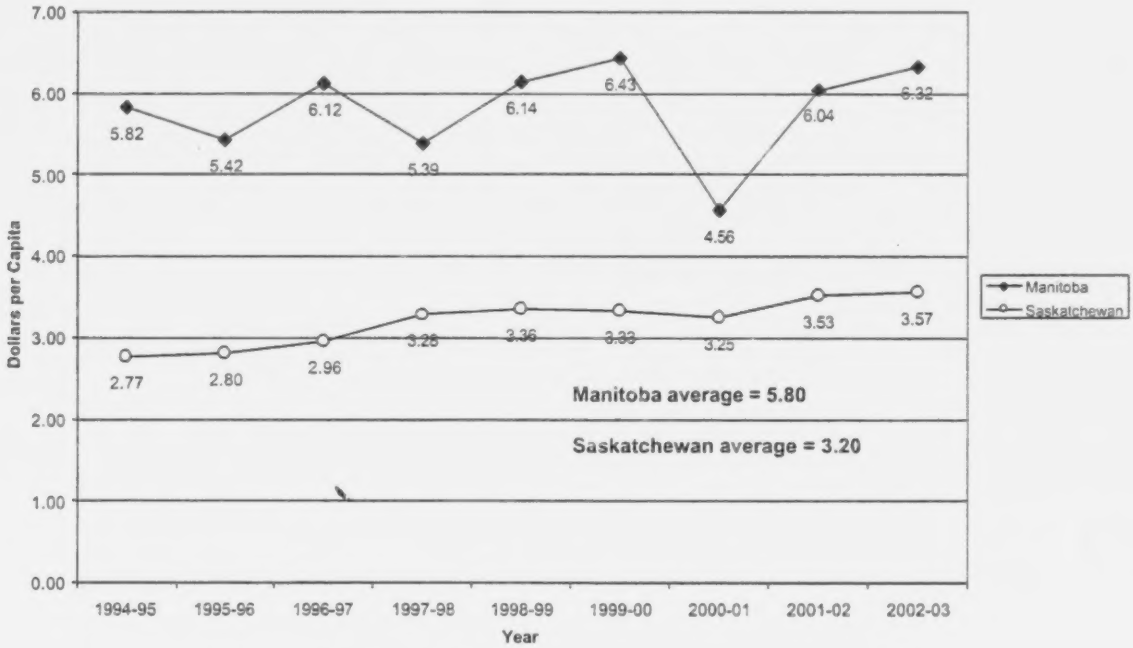
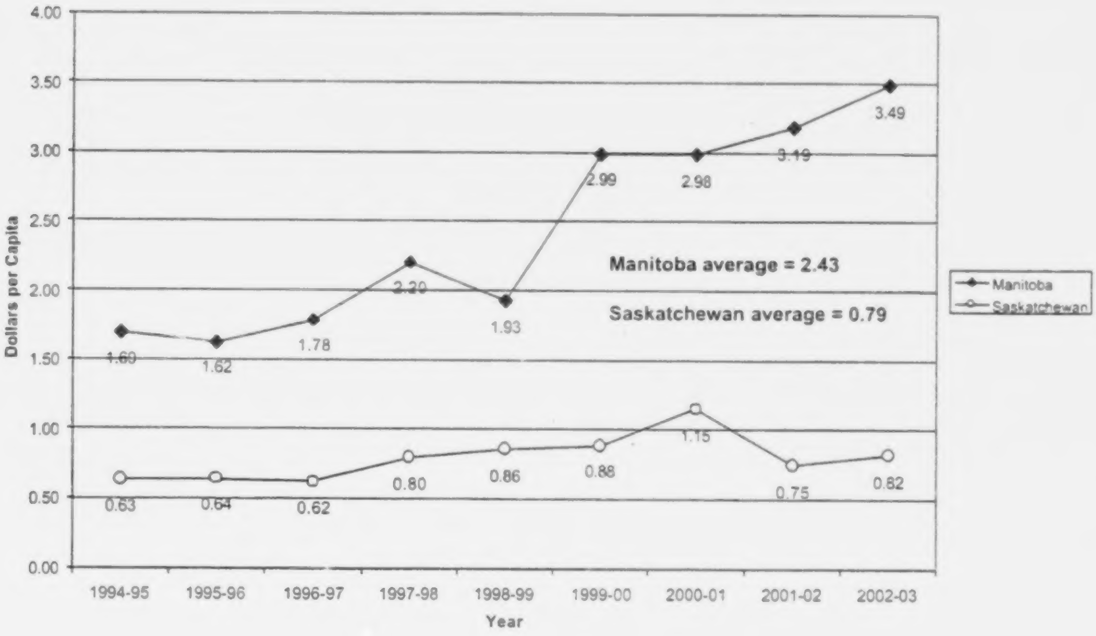


Chart 5.4 – Total Per Capita Expenditures on Central Administration – Manitoba Versus Saskatchewan

This chart illustrates that Manitoba's expenditures per capita on central administration are significantly higher than those in Saskatchewan. Manitoba's average from 1994/95 to 2002/03 is $2.43 while Saskatchewan's average is $0.79.

Source: CCJS Legal aid in Canada: resource and caseload statistics. The sole exception is 2002/03 Manitoba data which was taken directly from the 2003 Legal Aid Manitoba annual report.



Also attached as Appendix G are charts illustrating the per capita expenditures in Manitoba and Saskatchewan on criminal and civil legal aid, adding to both a relevant proportion of central administration costs.

The review also attempted to take the expenditures as reported in the annual audited financial statements for Manitoba and Saskatchewan and to adjust the statements for known differences in accounting practices, program offerings, as well as the eligibility and coverage differences discussed in the report. The review did this to see if there were substantial differences in the costs of the plans when known and recognizable differences were eliminated. This attempt to make the expenditures for the provinces as comparable as possible is illustrated in Table 5.7 below.

As can be seen in Table 5.7, once the above noted differences are removed from Manitoba expenditures, the cost of the Manitoba plan is $1.2 million greater than Saskatchewan's plan. The $1.2 million difference may be associated with the higher administration costs in Manitoba.

Table 5.7 – Comparing Manitoba and Saskatchewan Legal Aid Expenditures

Restatement of Manitoba expenses by eliminating Program and Accounting differences between Manitoba and Saskatchewan Legal Aid programs

For the year ending March 31, 2003

Reported Annual Expenses (Dollars)	**Saskatchewan**		**Manitoba**	
Salaries and Employee Benefits	8,412,135		7,697,266	
Pension Accrual	410,639		1,218,034	
Severance and Vacation Accrual	62,506		90,390	
Central Office Administration	282,537		536,481	
Area Office Administration	1,218,294		1,052,224	
Professional Fees and Insurance	144,711		273,562	
Public Interest Law Center			718,085	
University Law Center			79,062	
Bad Debt Expense			105,913	
Provision of Legal Services	978,925		8,253,460	
Other Legal Expenses	200,059		283,938	
Travel	454,056		87,591	
Purchase of Fixed Assets	74,979			
Total	12,238,841		20,396,006	
Elimination of Differences				
(1) Accounting Treatment Differences				
Bad Debt Expenses		-	105,913	
Pension Accrual Treatment		-	807,395	
Contributed Services		-	128,944	
(2) Program Differences				
Public Interest Law Center		-	718,085	
University Law Center		-	79,062	
Aboriginal Law Office		-	336,424	
Administrative Costs Related to Expanded Eligibilty		-	74,000	
(3) Service Delivery Differences				
Poverty Law Salary Costs		-	71,500	
Expanded Duty Counsel		-	737,491	Note 1
Drop-In		-	505,393	
Outreach		-	89,017	
(4) Financial Eligibility & Coverage Differences		-	3,298,637	Note 2
Adjusted Expenditures	Saskatchewan		Manitoba	
	12,238,841		13,444,145	
Net Difference - Manitoba to Saskatchewan			**1,205,304**	

Note 1 Saskatchewan has a small duty counsel project in Regina and Saskatoon and handles approximately ten per cent of the volume handled in Manitoba. To represent the difference in level of service, the Manitoba duty counsel costs were reduced by ten per cent.

Note 2 Saskatchewan's eligibility guidelines are more restrictive than Manitoba guidelines. In addition, Manitoba covers more services under family and civil matters that Saskatchewan. It is assumed that the net difference in family and civil certificates in Manitoba as compared to Saskatchewan is the result of these eligibility and service delivery differences. The difference in volume of certificates has been costed as follows:

Total Difference		4065 certificates		
			Average Cost	Cost
	Staff	1499	1162.33	1,742,333
	Private Bar	2666	583.76	1,556,304
	Total			3,298,637

5.5. Financial Summary – Manitoba Versus Saskatchewan

The difference in cost between Manitoba and Saskatchewan plans may be attributable more to differences in coverage than differences in delivery models. Interestingly, as illustrated in Table 5.4 in the prior section, while the most current Canadian Centre for Justice Statistics (CCJS) data illustrates that Manitoba ranks fourth on per capita criminal expenditures, Saskatchewan ranks third amongst the provinces. This comparison tends to reduce the impact of different coverage as almost all plans deliver the same minimum criminal legal aid services. What this means is Manitoba and Saskatchewan expenditures on core criminal services are very similar. Manitoba's higher per capita expenditures on civil law services are likely due in large measure to the fact that Manitoba delivers a much broader range of civil services than Saskatchewan does.

There are, however, two areas worth further investigation – the costs of administration and the delivery of higher cost criminal cases. As previously noted, the review recommends further analysis of Legal Aid Manitoba administration costs and the delivery of higher cost criminal cases will be discussed later in the report.

6. Delivery Models

6.1. Research on Delivery Models

In this section the review briefly examines research and writing on the debate over which delivery model is better, staff or private bar. The review notes that research has found, generally, that in criminal matters, staff could provide the same quality of service as the private bar for less cost. The review then looks at the emergence of a consensus as regards the desirability of a "mixed model" and the emerging concept of a "complex mixed model".

As noted earlier, Ontario, British Columbia, New Brunswick and Alberta are predominantly judicare or private bar systems in which private lawyers are issued certificates to deliver legal services.

Saskatchewan, Newfoundland and Labrador, Nova Scotia and Prince Edward Island are mainly staff lawyer systems in which lawyers employed directly by the plan deliver the majority of legal services.

Manitoba and Quebec have mixed systems using both private bar and staff lawyers to deliver services.

Albert Currie, Principal Researcher with the Access to Justice, Research and Statistics Division of Department of Justice Canada, and the leading Canadian legal aid researcher, has reviewed the literature world wide with respect to the delivery model debate.

He notes that the choice of delivery model is not a question of pure empirical data analysis. He says:

> .... events in the history of the delivery models debate in Canada demonstrate the continuing opposition of the private bar to staff lawyers delivery. This shows that a

> delivery model is not only a technical-administrative mode of service delivery. There is a politic to delivery models reflecting a set of vested interests, typically very strong vested interests on the part of influential actors in the system.[66]

After reviewing the research, Currie concludes that:

> ... the empirical research that has been conducted to date in Canada points consistently to the conclusion that staff lawyer delivery is less expensive than judicare delivery.[67]

He then deals with the question of quality: if staff lawyers are less expensive, is the quality of services comparable to that of the private bar?

Again, after reviewing the relevant research, Currie concludes that:

> These results from studies conducted in different places and at different times all point to the same conclusion. Staff lawyers achieve similar conviction rates compared with private bar lawyers. Staff lawyers usually get fewer custodial sentences for their clients. This suggests that the quality of service provided by staff lawyers is at least equal to that provided by the private bar.[68]

And further:

> Based on the Canadian research, it can be concluded that staff lawyer delivery can be less expensive than private bar delivery, with no compromise with respect to quality of service. These conclusions are based on several studies carried out in different places and at different times, in legal aid plans which are different in many respects. Each study may have some methodological shortcomings, as one expects in all research into complex issues. However, the strength of this body of research is in the consistency of the findings regardless of differences in research approaches and settings.[69]

Finally, the review notes that a number of studies referenced by Zemans and Monahan, reached similar conclusions. As the Federal Department of Justice's 1994 report, *Patterns in Legal Aid*, observes, "it appears that the staff model is capable of delivering the same service for lower cost than the judicare model or slightly better outcomes for the same costs."[70] Citing this study, Zemans and Monahan go on to note that "[s]everal evaluations have demonstrated that clients are generally as satisfied with staff lawyers as they are with private counsel".[71]

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[66] A. Currie. Legal Aid Delivery Models in Canada: Past Experience and Future Developments. (2000) UBC Law Review (Vol 33:2) at 294 [hereinafter Currie].

[67] *Ibid* at 297.

[68] *Ibid* at 299.

[69] *Ibid* at 304.

[70] Department of Justice, Bureau of Review, *Patterns in Legal Aid, 2nd Ed.* (Ottawa: Department of Justice, 1994) at 34, cited in Zemans and Monahan, *supra* note 5 at 149.

[71] Zemans and Monahan, *supra* note 5 at 149.

There are a couple of caveats to these findings. One is that productivity is extremely important and that productivity must be managed. The other is that the research applies only to criminal law matters.

On productivity, Currie states,

> The relative cost effectiveness of the two basic delivery modes is a function of three variables; the level of the tariff, the sum of costs of staff lawyer salaries, benefits and overhead, and the *productivity* of the staff lawyers. A management strategy designed specifically to achieve productivity is necessary. Ultimately, cost-effectiveness must be achieved through productivity management. It does not come about automatically through some mechanism akin to the *hidden hand* in Adam Smith's economics.[72]

With respect to other cases, such as family law matters, Currie points out, "family law cases are not so structured as are criminal cases. The issues in a family law dispute may be more complex and emotionally charged. Family law cases may be more protracted as disputes evolve over time."[73] In fact, as shown later in this report, my research has found that on family law matters, the private bar is less expensive than staff.

6.2. The Mixed Model

The debate however, has moved beyond staff versus private bar. In the research a consensus has been reached in favour of a mixed model. Nancy Henderson, then of Legal Aid British Columbia, writes:

> After twenty years of studies and debates over the most efficient model of service delivery, there is little left to say. The mixed model is the favoured approach—for some very compelling reasons. Staff can be cost-effective, if case loads and case costs are kept at levels that keep average cost per case below that on the tariff. But there are other significant benefits to having staff lawyers as part of the service delivery mix: they act as monitors within the justice system—not only as monitors to the tariff bar, but in other areas as well, such as court practices, and on other changes being effected within the system that may have an impact on the legal aid plan. Staff can also become a resource and sounding board for issues such as service delivery modifications, coverage changes, tariff revisions, and evaluation projects. Staff can provide a source of expertise and credibility for the plan—a defence against the suggestion that the "faceless bureaucracy" makes all the decisions about legal aid and is unfamiliar with current practice in the courts.
>
> Staff can also be well used in a case management program. There are types of cases where it would be more cost effective to have staff counsel represent the accused than to pay for counsel on the tariff. Staff can also be used to reap the benefits for the plan of specialization in an area of law and the consequent efficiencies of time. Staff can also be fairly easily managed for a level of quality control in their service delivery.

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[72] Currie *supra* note 66 at 316.

[73] *Ibid.* at 317.

> The tariff mode of service delivery is criticized for being too open-ended and out of control, but flexibility in accommodating changing case volumes is a necessity in legal aid. After the rollercoaster upswings in volumes, we are now experiencing stability and some downward shifts. Tariff service delivery is better able to shrink with demand than staff or contract delivery models. Depending on the levels at which the tariffs are set, and the way in which cases are managed, tariff costs per case may drop below staff costs per case. Tariff service delivery with the private bar also has the significant benefit of encouraging a pool of legal practitioners who are active with, knowledgeable about and committed to legal aid.
>
> The greatest benefits from all of these advantages, however, can only exist in the context of a mix. For example, case management of tariff cases alone cannot offer the advantages that case streaming along with case management can offer in terms of the control over the cost of the case. The ability to stream cases between models should ensure that the case is handled by the model that will provide service on the case most cost-effectively, and the inevitable competition between the models should increase the advantages of the mix for controlling costs.[74]

Allan Fineblit, former Executive Director of Legal Aid Manitoba, makes many of these points and expands on the ability of the mixed system to control costs. He states:

> Many staff lawyers are unionized. The negotiating power of their union is greatly enhanced where no private bar option exists. A staff lawyer strike where no alternative exists, can have devastating impact on the justice system and on legally aided clients. Strikes are a tool available to the private bar as well. While they are not technically unions, private bar groups representing the interests of private lawyers doing legal aid work have been able to carry out effective withdrawals of service. It is noteworthy that the effectiveness of the withdrawal is inversely related to the percentage of work going to staff lawyers in the jurisdiction at the time.
>
> More important than withdrawals of service, which are infrequent events, a manager in a mixed system is able to negotiate important issues such as productivity, salary, benefits, and tariff rates much more effectively when there is another option. This powerful management tool should not be underestimated when looking at the benefits of a mixed delivery model.[75]

Even in predominantly judicare jurisdictions there has been some movement towards a mixed model. Ontario has always had clinics and is now experimenting with staff for family law, some criminal law and duty counsel services. Alberta is using staff for family law. Only British Columbia has reduced the staff component and did so when it changed its delivery of family law services.

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[74] N. Henderson (1997). *Issues Concerning Legal Aid and Some British Columbia Experiences.* In A New Legal Aid Plan for Ontario: Background Papers. Edited by Frederick H. Zemans, Patrick J. Monahan and Aneurin Thomas. Osgoode Hall Law School. York University Centre for Public Law and Public Policy. North York, ON, 1997, at 112 [hereinafter Henderson].

[75] A. Fineblit (1997). *Doing More With Less. In A New Legal Aid Plan for Ontario: Background Papers.* Edited by Frederick H. Zemans, Patrick J. Monahan and Aneurin Thomas. Osgoode Hall Law School. York University Centre for Public Law and Public Policy. North York, ON, 1997,at 78 [hereinafter Fineblit].

Interviews with personnel from predominantly staff systems suggest that they would like to have the flexibility to use more private bar lawyers but are precluded from doing so by the lack of private bar lawyers in an area or union contracts and provincial labour laws or both.

The simple mixed model is giving way to what Currie describes as the complex mixed model. In this emerging model, not only is there a mix of private bar and staff lawyers, but use of a variety of delivery mechanisms to respond to differing client needs. Currie writes:

> Legal aid delivery is not a simple, one-dimensional issue. A delivery model must provide the best service possible, in the most cost-effective manner, and in ways that address a number of major aspects of service delivery. Legal aid service is provided in different areas of law, to diverse client groups, in different geographical areas, and involving cases that vary from simple to the very complex. These and other factors make legal aid delivery a complex and multidimensional problem, not a simple and unidimensional one. It stands to reason, then, that neither private bar lawyers providing service on an individual fee-for-service basis nor staff lawyers providing a similar service as salaried employees will necessarily be the best solution to all delivery problems.
>
> Legal aid delivery in Canada is moving beyond the ***simple mixed model*** of staff lawyer and judicare delivery that has framed the debate about cost and quality in Canada for the past twenty years. What may be termed ***complex mixed models*** are emerging in Canadian legal aid, in which a variety of delivery modes are being developed to target specific service delivery needs.[76]

Currie then goes on to describe some different approaches used in a complex mixed model such as contracting, expanded duty counsel, pilot projects in Ontario, immigration in Ontario, the Alberta Youth Staff Office and assisted self-representation.

In *From Crisis to Reform: A New Legal Aid Plan for Ontario*, a set of principles for delivery models is suggested. These principles reflect a complex mixed model, take into account governments' need for better financial management and are described below.

> If limited funding forces a plan to assess, prioritize, and respond to different categories of legal need, the plan's delivery system must be organized carefully. More specifically, a plan's system for delivering services must take into account the following principles:
>
> - Delivery models should be closely tailored to client needs.
>
> It is clear that different clients and/or client groups have different needs. A delivery system must be able to respond to specific needs appropriately and effectively.
>
> - The delivery system must be organized so as to promote organizational flexibility and its ability to respond to a variety of legal needs/service priorities.

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[76] Currie, *supra* note 66 at 305.

Closely related to the first principle, this principle suggests that a well-designed delivery system should be able to utilize a diverse range of service providers in order to allocate resources as quickly and efficiently as possible. Conversely, a rigid or inflexible delivery system is likely to be unable to adapt to changing legal needs and new service priorities.

- All services must be delivered by the most cost-effective means possible.

In a fixed-funding environment, cost-effectiveness is an absolute priority. Resources which can be "saved" in one area can be devoted to improving service in another. In general terms, cost-effectiveness can be improved by encouraging specialization and competition, or diverting all or portions of services to equally effective but less expensive service providers. This principle also suggests that a legal aid plan must have an ability to evaluate and direct its services selectively through the use of test cases, law reform activities, or other measures designed to have a broad impact.

- Program managers need as much empirical information as possible about the cost, quality, operation and impact of alternative delivery mechanisms.

This principle is directly related to services being delivered by the most cost-effective means possible. This principle confirms the need for a legal aid system to have a significant research capacity and management data. It also suggests the need for ongoing, sophisticated experimentation with alternative delivery models.[77]

Manitoba is now a complex mixed model. In the past Manitoba has been a leader in the development of such a model. It pioneered bulk contracting for legal services, expanded duty counsel, expanded eligibility, poverty law services, drop-ins, and in addition provides specialized clinics for public interest law and aboriginal law.

The review of the research and legal aid literature, as well as the past success of Legal Aid Manitoba, leads one to the conclusion that some version of the complex mixed model should be maintained unless there are financial or other compelling reasons for change. However, the mix and delivery modes will vary over time.

In fact, the literature suggests that dramatic changes to a legal aid system may meet with considerable resistance. In describing such changes, Nancy Henderson uses the phrase "turning a supertanker" and notes that these changes must be carefully managed.[78]

In both Ontario and British Columbia, attempts to increase the staff component of a judicare plan have met stiff resistance from the bar. Alan Young, a law professor at Osgoode Hall, notes that "most jurisdictions are wedded to the model chosen at the outset of their programs. In recent years, British Columbia attempted to move away from a judicare to a more developed staff model, and the lawyers organized a protest and work stoppage which forced the government to back down."[79]

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[77] Zemans and Monahan, *supra* note 5 at 141.

[78] Henderson, *supra* note 74 at 116.

Newfoundland and Labrador is one jurisdiction that has successfully changed its delivery model. Newfoundland and Labrador had a mixed system but found it increasingly difficult to find private bar lawyers who would take cases and was then faced with a demand for a 60 per cent increase in its tariff. As a result it decided to move to a staff system. It did this over a period of three years.

These examples make a further point. The question of which approach is most cost effective can change over time. The costs are dependent on the relationship of the local tariff, the cost of staff, (i.e. salaries, benefits, overhead) and the productivity of staff lawyers.

6.3. Choice of Counsel

Both Quebec and Manitoba, the provinces that the literature suggests have the most fully developed mixed models, allow some level of choice of counsel. However, the ability to be flexible and to use the most cost-effective delivery model will eventually collide with the freedom of a client to choose his or her lawyer.

As Nancy Henderson notes:

> To take advantage of the benefits of a mixed model system, a legal aid plan must be able to manage the flow of cases to each area of service delivery in order to optimize the cost of each case and the quality of service. Experimentation may prove that certain types of cases are more efficiently handled by staff than the private bar. Other types of cases may prove ideally suited to the contracting model. Even within a mode of service delivery there are efficiencies to be realized: for example, there are efficiencies to be realized in the streaming of cases to take into account a special expertise of counsel, such as another language which would reduce the cost of interpretation, or experience with a previous and similar case which would reduce the cost of preparation; or cases may be streamed to one counsel for representation of co-accused, which would reduce the cost of separate representation. Any of this streaming affects a clients free choice of counsel but illustrates the clear cost implications to maintaining choice over management."[80]

The effectiveness of a staff system depends upon a certain level of staff productivity. This requires the ability to stream cases to staff lawyers and, in so doing, to override a client's choice of counsel.

Alan Young has also commented on the issue of choice. He writes:

> One of the shortcomings of the staff model is the absence of choice. In principle, choice should be maximized because individuals should have some degree of autonomy when involved in a process which may ultimately lead to a deprivation of

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[79] A. Young (1997) *Legal Aid and Criminal Justice in Ontario.* In Ministry of the Attorney-General for Ontario. Ontario Legal Aid Review: A Blueprint for Publicly Funded Legal Services (1997) (Volume 2) at 652 [hereinafter Young].

[80] Henderson, *supra* note 74 at 101.

> liberty. However, with the exception of some American studies which document client discontent with public defenders, the Canadian studies demonstrate that client satisfaction is roughly the same whether the client is within a choice-laden judicare model or a choice-restricted staff model.
>
> The Canadian Bar Association reports that the majority of dients are "unable or unwilling to exercise choice when given the opportunity". Unlike clients seeking legal service in the corporate and commercial fields, most accused persons (especially first offenders) have insufficient information upon which to base a decision as to counsel of choice. The accused person may know the names of high-profile lawyers from media reports, but it is unlikely that he/she would be able to retain the services of this lawyer on a legal aid certificate.
>
> In a very general sense, the presence of choice may enhance client satisfaction; however, it appears that the importance of choice of counsel is magnified in the eyes of the private lawyers. This may be why choice of counsel has not been recognized as a constitutional imperative. It is a luxury, not a necessity.[81]

As choice of counsel is not a constitutional requirement, it is not present in every legal aid plan. Choice of counsel does not exist in Saskatchewan, Newfoundland and Labrador, Nova Scotia, Prince Edward Island and for some aspects of service delivery in Alberta and Manitoba.

Moreover, choice has never been totally open. In those plans offering choice, clients are free to choose a lawyer, but only a lawyer who is prepared to provide services at the legal aid tariff.

The lack of choice does not relieve the state of its obligation to provide competent counsel. As noted, studies show that staff is at least as competent as the private bar.

As mentioned above, *The Legal Aid Services Society of Manitoba Act* already allows limits on choice of counsel.

Section 14(1) states:

> Except where the board otherwise directs, legal aid shall be provided by a solicitor registered as a member of the panel and
> (a) selected by the applicant; or
> (b) where the applicant declines or is unable to select a solicitor, appointed by an area director or the executive director.

The Board has used this provision to develop staff units that specialize in youth and child protection matters.

Choice is an important issue, as a plan can only attain the efficiencies that staff offers if that staff is fully productive. To ensure that staff has a full caseload, it will be necessary to limit choice of counsel so that management can stream cases to staff lawyers. The elimination of choice may not mean that choice is fully eliminated in practice. Where management decides that the private bar is a more efficient delivery mechanism, the client can still choose among the lawyers prepared to work for the legal aid tariff.

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[81] Young, *supra* note 79 at 663.

6.4. Legal Conflicts

Another issue that staff systems must face is how to handle conflicts of interest. The most typical conflict of interest that comes up for a lawyer relates to the use or abuse of confidential information. In order to be able to give proper legal advice, lawyers need to obtain all kinds of information from their clients, some of which could be harmful to the client if disclosed unnecessarily and without permission. This is why lawyers owe a special duty to keep their communications with clients strictly confidential.

A conflict of interest relating to confidential information can arise in a number of ways in the areas of law typically covered by legal aid. In a divorce, for example, the same law firm would not represent both spouses as the lawyer acting for each would have information the other should not know. Public confidence in the justice system would be weakened in such a case. Another example of a conflict of interest would be if one lawyer in the firm was defending a spouse against a charge of domestic violence while another lawyer in the same firm was acting for the victim spouse in a divorce petition against the charged spouse. In criminal law, a conflict could arise if the same law firm was acting in the defense of co-accused. As long as the interests of the co-accused did not diverge there might not be a conflict. If, however, one of the accused decided to accept a plea bargain that require him or her to testify against the other co-accused their interests would not be the same and lawyers from the same firm could not act for both.

Very generally speaking, a conflict of interest arising in the context of providing legal advice may have two major legal consequences. Firstly, it may result in an unfair criminal proceeding, and, as a result, a court ruling that the client's *Charter* rights to a fair trial have been violated. The courts have various powers to remedy this type of infringement. Secondly, the client may have a complaint against the lawyer who may be in breach of his or her ethical and professional obligation to avoid conflicts of interest. This obligation is often set out in the provincial statute that regulates the practice of law.[82]

In a judicare system, conflicts do not become a serious problem. If a conflict is apparent at the outset of a case or arises as the case progresses, a lawyer from another private bar law firm can act from the outset for the new client or replace a lawyer in conflict. The conflict disappears because the new lawyer will not have access to confidential information that could work against the interests of the client who remains with the staff lawyer.

As the proportion of staff lawyers becomes greater, the likelihood of a situation arising where there is a conflict of interest between clients of the staff lawyer group grows. In a mixed system, such conflicts can be handled by referring a case to the private bar. In a staff system, if the legal aid plan is considered one large law firm, conflicts become a more serious problem because legal aid would only be able to act on one side in the situations outlined above.

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[82] See: M. Proulx and D. Layton, *Ethics and Canadian Criminal Law* Toronto; Irwin Law, 2001) at 286-293..

For Manitoba's legal aid plan, the degree to which conflicts of interest become an issue will depend upon the percentage of cases handled by staff. The higher the percentage, the more significant the possibility of conflict of interest.

The solution adopted in Canadian legal aid plans that are predominantly staff systems is to design and treat each legal aid office as a separate office or law firm. In Saskatchewan, each legal aid office started as a separate office with its own community board. When the offices were consolidated under one province wide commission, the separate offices were retained. Thus, offices are structurally and administratively separate. They have their own space, computer systems, and libraries for example. Saskatchewan's *The Legal Aid Act*[83] also contains a provision that a lawyer does not commit a breach of a by-law of the Law Society of Saskatchewan relating to conflict of interest if he or she is advising or representing a person in a dispute where the opposite party is also being advised or represented by another legal aid lawyer. Therefore, in Saskatchewan, lawyers from one office will represent clients in disputes where the other party is represented by a lawyer from another legal aid office.

Newfoundland and Labrador also faced this issue when it moved from a mixed system to a staff system. It adopted the same solution as Saskatchewan. It structurally separated its offices and treats each office as separate. It also amended s. 31 of its *Legal Aid Act*[84] to provide:

> (7) Where a person applying for legal aid is a party to a dispute or case which involves a client for whom a solicitor employed by the commission acts as counsel, the applicant, if found eligible, may be assigned either to another solicitor who is employed by the commission or to a solicitor who is a member of the appropriate panel in an area.
>
> (8) Notwithstanding the *Law Society Act*, a solicitor employed by the commission does not commit a breach of a rule or code of legal ethics of the Law Society of Newfoundland relating to conflict of interest, by reason only of advising or representing a person in a dispute or case where another person involved in that dispute or case is being advised or represented by another solicitor employed by the commission.

Therefore, in Newfoundland, as in Saskatchewan, legal aid lawyers will act for parties that might otherwise be considered in conflict. Nova Scotia passed a similar amendment to its *Legal Aid Act*[85].

Following the lead in other provinces, Manitoba could establish each legal aid office as a separate office and also pass the appropriate legislation. The effect of structuring the offices with sufficient protection for confidential information is to prevent the type of conflict of interest that could, for example, lead to a *Charter* violation. The provincial legislation will not be sufficient to defeat a challenge under the *Charter*, however. Its purpose is to provide comfort to the staff of legal aid that they will not be found in breach of their duties under *The Legal Profession Act*.[86]

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[83] S.S. Chap. L-9.1, s. 31.

[84] R.S.N.L. 1990 Chap L-11.

[85] R.S.N.S. Chap. 252, s. 26A.

[86] CCSM c. L107.

7. Cost Analysis

This section provides a detailed cost analysis and information on a variety of staff/private bar mixes in order to develop conclusions on the most cost effective mix of staff and private bar lawyers to deliver core legal aid services in Manitoba.

Costs in the legal aid plan are driven by three factors and these factors had to be considered in the chosen methodology. As stated by Allan Fineblit in his article for the Ontario Legal Aid Review Report, *From Crisis to Reform, a New Legal Aid Plan for Ontario: Background Papers*:

> When considering the cost of delivery models, there are three important factors which are determinative: Two are well known, and one is not. Most discussions focus on the rates in the tariff paid to the private bar lawyers and salaries and benefits paid to staff as the key determinants of the comparative costs.
>
> Just as important, but less discussed is staff lawyer productivity.[87]

Before discussing the details of the cost analysis, the review briefly turns to the tariff and describes how the tariff works and how it compares to other provinces.

7.1. Tariffs

Legal aid tariffs of fees apply to private lawyer services and have been established in all jurisdictions. These tariffs outline the standards and guidelines for how private lawyers' accounts should be paid in the areas of criminal, family, and other civil law. Given that the legal aid plans use these tariffs when providing private lawyers with payment for their legal aid cases, they can have a large impact on the plan expenditures.

The tariff usually sets out both an hourly rate and block fees (i.e. a flat fee prescribed for certain types of cases and/or services). In several jurisdictions, the fee level may also depend on the lawyer's years of experience, the type of case, and the level of court in which proceedings will take place. General preparation fees may also be covered in the tariffs, and are often specified by the jurisdictions.

The current tariff in Manitoba nominally pays $53 per hour. While some items are paid at the hourly rate with prescribed maximums, the tariff is, for the most part, a block fee tariff. The tariff, as set out in the *Legal Aid Regulation*, is separated into the following categories: fees in criminal matters; fees in civil matters; fees in domestic matters; and fees in immigration matters.

A sampling of common block fees in Manitoba is highlighted for illustrative purposes. The usual fee for a break and enter guilty plea is $290. The usual fee for a robbery case comprised of a one day preliminary hearing and two day trial is $2,725. Finally, the usual fee for a separation upon marriage breakdown is $760.

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[87] Fineblit, *supra* note 75 at 74.

The Legal Aid Manitoba Board of Directors may recommend changes to the tariff but the actual tariff rates are set by an Order-in-Council of the provincial government. Changes to the tariff take place after consultation with representatives of the private bar lawyers who provide service under the plan.

The Legal Aid Manitoba tariff rates were increased on April 1, 2003. This change included both an hourly rate increase from $48 to $53 per hour as well as increases in the hours of work included in block tariff rates. Prior to this time, the tariff was last increased on August 1, 2000 from $45 to $48 per hour.

Before that time, it had been over ten years since the Legal Aid Manitoba tariff was last increased. In 1986 a three phase tariff increase was announced which would see a tariff increase from $35 to $40 in 1986, from $40 to $45 in 1987, and from $45 to $50 in 1988. The 1988 increase was, however, never implemented.

Before concluding this discussion of tariff it is important to make special note of enhancements (also known as discretionary increases) and holdbacks.

Section 40 of the *Legal Aid Regulation* provides that if "extremely unusual circumstances" exist, the executive director may increase or decrease the fees paid to a private bar lawyer. On the subject of process, to apply for an enhancement, the solicitor may apply in writing to the executive director to increase the fees provided in the tariff schedule by submitting an itemized account and an explanation of the circumstances that justify an increased fee. The use of enhancements has become increasingly common in recent years to make payments for private bar services in Manitoba. In Manitoba the reviewer understands that the majority of, and the larger of, the enhancements are paid on criminal cases, particularly for the more serious and complex "Category A" offences. Category A offences are defined in *The Legal Aid Regulation* to include the following: aggravated sexual assault, manslaughter, murder, attempt murder, and conspiracy to commit murder.

It is also important to note the use of tariff holdbacks in Manitoba. As a cost reduction measure, Legal Aid Manitoba initiated "holdbacks" in some years. Holdbacks essentially reduce the tariff rate by a fixed percentage. In the 2003/04 fiscal year, the province provided Legal Aid Manitoba with additional funding to eliminate the need for a holdback.

A brief overview of the tariff(s) in each province is provided in Appendix H.

7.1.1. How does Manitoba's Tariff Compare with Other Provinces?

What becomes apparent after reviewing the plans from across Canada is that Manitoba's hourly rate is below average. It is, however, difficult to make meaningful comparisons on the basis of hourly rates due to the extensive use of block fees in many of the plans across Canada. For this reason, the Association of Legal Aid Plans of Canada have used three block fees for comparison purposes among members. These block fees are: the usual fee for a break and enter guilty plea, the usual fee for a robbery case comprised of a one day preliminary hearing and two day trial, and the usual fee for a separation with one interim motion and contested. Manitoba's usual fee for a break and enter guilty plea (a block fee) is below average compared to the other provinces. In contrast, Manitoba's usual fees for a robbery case (comprised of a one day preliminary hearing and two day trial) and for a separation case are above average compared to the other provinces.

7.2. Costing

7.2.1. Methodology

The costing methodology used in this review for comparing service delivery options was carefully developed and examined. The challenge in developing the methodology was to ensure that the calculated average cost per case for both the private bar and staff lawyers fairly compared the delivery options. It was important that the methodology accurately represented the various cost components of the service delivery options as well as the variables that might affect the cost. As noted previously in the quote by Allan Fineblit, costs in a legal aid plan are driven by the tariff, the salaries and operating costs of staff lawyers, and the productivity of the staff lawyers. The methodology used included these three cost factors.

Simply stated, the methodology compares the average cost per case for the private bar to the average cost per case for staff lawyers and determined a cost or savings based on a set volume of work.

Given the need to develop a methodology that allowed for the most reliable comparisons possible, several approaches to calculating average cost per case for staff lawyers were developed, discussed, refined and reviewed. Two were retained. The methods for calculating average cost per case are discussed below.

7.2.2. Average Cost for the Private Bar

The first step in comparing various mixes of staff/private bar delivery models was to establish an average cost per case for the cases handled by the private bar and staff. For the private bar, the average cost per case is relatively easy to arrive at as Legal Aid Manitoba maintains records of amounts paid to the private bar on an annual basis. For the 2002/03 fiscal year, Legal Aid Manitoba reported the following for private bar payments in Table 7.1 below.

Table 7.1

Private Bar Average Cost Per Case for the 2002/03 Fiscal Year

	Total Completed Certificates	Total Amount Paid	Average Cost Per Case	Average Cost Per Case (Excluding Large Cases)
Criminal	6,685	$ 4,531,287	$ 677.83	$ 501.97
Youth	1,453	$ 633,403	$ 435.93	
Family	5,794	$ 3,382,328	$ 583.76	$ 583.76

In calculating an overall average cost per case for criminal cases, youth cases were averaged in with adult criminal cases. In order to ensure that the average cost was comparable, the average cost for criminal cases was adjusted by removing the costs related to 39 large cases (defined as any case that was assigned to the private bar and cost more that $10,000). These cases were removed because, in most cases, Legal Aid Manitoba staff do not currently do these kind of cases and the costs associated with these cases distort the overall average cost. Removing these cases resulted in the average cost for criminal cases decreasing to $501.97.

The private bar average cost per case was then increased by 20 per cent to reflect the new tariff introduced on April 1, 2003 and an amount was added for the overhead costs incurred by Legal Aid Manitoba specific to administering the private bar accounts. The adjusted average cost per case for the private bar used in the comparisons is:

Criminal average cost per case	$619.53
Family average cost per case	$716.51

A summary of the average cost per case as reported in the Legal Aid Manitoba annual reports for the private bar for adult criminal, youth criminal and family cases from 1990 to 2003 is provided as Appendix I. These reported costs include the costs for large cases but do not reflect overhead costs. For these reasons, the reviewer believes that the costs that the review is using allow for fairer comparisons. The review has included this summary in appendix form, however, to provide a history of average cost per case.

7.2.3. Average Cost for the Staff Lawyers

Determining an average cost per case for staff proved to be more challenging than developing an average cost per case for the private bar. As a result, three main methods of calculating the average cost per case were explored. These methods are outlined below.

7.2.3.1. Billed Hours Approach

Legal Aid Manitoba maintains records of hours worked on a per case basis in their Community Law Office System (CLOS). The system applies a billing rate to the hours worked to determine a cost for the case, which could then be compiled to arrive at a total cost for cases similar to the report completed for the private bar.

Issues arose with respect to the billing rate applied to the hours worked on a file. Legal Aid Manitoba had changed the way that it calculated the billing rate in early 2003/04 in an attempt to more accurately capture all of the costs, both direct and indirect that applied to a community law office program. As a result, for cases which spanned fiscal years, there was a dramatic change in the billing rate for hours spent in one year as opposed to hours associated to a file in the next fiscal year, resulting in a distorted cost for a case and, an understated average cost per case when compared on a total basis. Given the issues with respect to the average cost per case using billed hours, this approach was not used for any of the analysis discussed in this report.

7.2.3.2. Hourly Rate per Lawyer Approach

A second approach was developed, which calculated an hourly rate per staff lawyer and then multiplied this by the number of hours per case reported in CLOS to determine an overall average cost per case. The hourly rate per lawyer was calculated as follows:

$$\textbf{Hourly rate per lawyer} = \frac{\textbf{Total actual annual office costs (salary, benefits and overhead)}}{\textbf{No. of active lawyers}^{88}\ \textbf{x Annual billable hours per lawyer (1600)}^{89}}$$

Salaries included base salaries, pension costs, and benefit costs as well as vacation and severance accruals. Salaries were increased to reflect an estimated salary level for the 2004/05 fiscal year.

Hourly rates were calculated for the Winnipeg-based Criminal Law and Family Law Offices (including the Child Protection Office) and for the regional offices located in Brandon, Dauphin, The Pas and Thompson.[90] The hourly rates were then applied to the reported hours for each of the above noted categories of cases and that result was then divided by the number of completed files to arrive at an average cost per case before disbursements. An average disbursement amount was then added to arrive at an overall average cost per case. The details of the hourly rate per lawyer approach are provided in Appendix J.

The average cost per case is provided in Table 7.2, later in this section.

There was some concern that the average cost per case as calculated in the hourly rate approach could not be compared to the average cost per case for the private bar because there was a difference in the types of cases handled by staff as compared to the cases handled by the private bar. Staff handle a significant number of "certificate equivalent" cases (79 per cent of the total completed criminal casework assigned to staff in the year). These cases come to staff legal aid lawyers through duty counsel work and may be faster and easier to complete than a regular certificate. The certificate equivalents tend to have a high number of quick guilty pleas or stays on average and generally can be resolved with a few hours of work. Staff may receive actual certificates when a person applies for legal aid outside of duty counsel but does not specify a lawyer or when private bar will not accept the work. Staff lawyers must convert certificate equivalents to certificates if the case is to go to trial or if disbursements exceed $100. A staff practice therefore consists of duty counsel, certificate equivalents and certificates.

Private bar lawyers are issued certificates because the client has requested that a specific lawyer represent them, because the private bar lawyer may have more expertise in the type of case, or because staff lawyers are at capacity at the time of the application. Some of the certificates

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[88] Active lawyers are lawyers employed by Legal Aid Manitoba and assigned to a community law office. If, for the sake of example, a lawyer was employed by Legal Aid Manitoba for only three months of the fiscal year, then that lawyer was considered to be .25 of an active lawyer.

[89] Standard billing hours were calculated at 7.25 hours per day for 220 working days per year.

[90] The Brandon office is known as the Westman Community Law Centre, the Dauphin office is known as the Parklands Community Law Centre, The Pas office is known as the Northlands Community Law Centre, and the Thompson office is known as the Thompson Community Law Centre.

issued to the private bar will be very similar to the staff certificate equivalents; however, it is not clear what percentage of the total private bar work would fall into that category.

A history of the number of certificates and certificate equivalents issued to the private bar and to staff is provided in Appendix K.

7.2.3.3. New Certificate Production Office Approach

To address the concerns about comparability of cases, another approach was developed. In this approach, an entirely new office was envisioned that would strictly process certificates and not perform any of the other duties of a community law office in Manitoba, such as duty counsel and drop-in work. This eliminated the concern about the possible difference in workloads between private bar and staff lawyers, as this office would be processing work that would have normally gone to the private bar. The approach assumed a ratio of junior and senior lawyers as well as a ratio of paralegal and support staff, depending upon whether the office would be processing criminal certificates or family certificates. The approach assumed a certain ratio of junior lawyers as compared to senior lawyers (77 per cent of the legal staff were to be junior staff) with an initial total complement of thirteen legal staff, including a supervising attorney. As in previous approaches, salaries included base salary costs plus benefit and pension costs.

Operating costs were based on the actual operating costs for existing community law offices, to arrive at a total cost for the office.

The key to this approach was to set production rates for the office and then to use these production rates to determine an average cost per case. Legal Aid Manitoba advised that the target production rates for staff is 280 completed files per year for a criminal lawyer and 180 files per year for a family lawyer. These target rates were used as the initial production levels for this approach. It appears that this approach provides the best comparison of private bar to staff costs and is used for detailed analysis later in this section.

The detailed calculation for the new certificate production office approach is provided in the attached Appendix L.

7.2.3.4. Staff Lawyer Cost per Case Summary

A summary of the average cost per case for staff lawyers for each one of the three approaches is as follows:

Table 7.2

Staff Lawyer Average Cost Per Case

Approach	Criminal	Civil/Family*
Billed Hours	$ 320.25	$ 665.40
Hourly Rate Per Lawyer	$ 479.38	$ 1,248.79
New Certificate Production Office	$ 489.95	$ 955.49

*The civil component of staff lawyer work is very small and thus family law is the more appropriate category for analysis of staff lawyer work.

Before moving on to apply the methodology, it is important to note that the reviewer consulted with a broad range of current and former senior legal aid personnel from the prairie provinces as well as a recognized expert in the field to develop and fine-tune the costing methodology. I extend my thanks to everyone consulted and in particular the following:

- The Legal Aid Manitoba executive, including Gerry McNeilly (Executive Director), Gil Clifford (Deputy Director), Bill Dunn (Legal Director), James Ramsey (Director of Management Information Systems) and Jan Perchal (Acting Director of Administration);
- Allan Fineblit, Chief Executive Officer of the Law Society of Manitoba and former Executive Director of Legal Aid Manitoba;
- Ron Klassen, Crown Counsel of the Family Law Branch of Manitoba Justice and former Acting Executive Director of Legal Aid Manitoba;
- The Saskatchewan Legal Aid Commission executive, including Jane Lancaster (Chief Executive Officer), Laura LaCoursiere (Executive Director of Administration) and Jerome Boyko (Director of Financial Management); and
- Albert Currie, Principal Researcher for the Access to Justice, Research and Statistics Division of Department of Justice Canada.

7.2.4. Application of the Methodology

Once an average cost per case was determined, a variety of scenarios were generated to compare the difference in costs between private bar and staff lawyer service delivery and to arrive at an estimated savings or cost. The analysis was separated out for the criminal and family cases and the results combined to arrive at a net savings or cost. The methodology was designed so that variables could be changed and then one could recalculate the savings or cost as a result of the change in variables. The variables that were modified were as follows:

- The production rates of the staff
- The mix of certificates assigned to the private bar and to staff
- The salary levels of the staff lawyers and support staff
- The rate of the tariff

It is important to note that, as mentioned earlier, the costs of large cases on the criminal side were removed from the average cost per case for the private bar. As a result, large cases are not considered in the costing. Large cases will be discussed later in this report.

Once a net cost or savings was determined related to the average cost per case, other associated costs were applied. The other costs include transition costs and start up costs.

7.2.4.1. Transition Costs

Transition costs are costs that will not be realized until some time in the future but relate to the change in operations under consideration. In the change under consideration in this review, that being moving to a larger staff component, the most significant transition cost is the cost related to the certificates currently issued to the private bar but not yet billed. In any particular fiscal year there will be certificates issued in the year that will not be completed and billed until the following year or even several years later. In any one year, as much as an estimated $7 million in unbilled certificates is with the private bar. While many of the issued certificates will be billed in the year that they are issued, a number of the certificates will be billed in the following fiscal year, with a declining number being billed in subsequent years. It can take up to six years to have virtually all of the certificates issued in one year closed and paid. By moving from a private bar system to a staff system or changing the mix of staff to private bar, Legal Aid Manitoba will begin immediately paying for the salary and overhead costs related to the staff. At the same time, Legal Aid Manitoba will also be paying the outstanding billings for certificates previously issued to the private bar. In the initial years, these transition costs will be substantial, but they will decline over time.

7.2.4.2. Start Up Funding

In addition to the transition costs, there will be cash requirements associated with bringing on new staff. The costs include purchasing furniture, computers, and possibly leasehold improvements. While the actual costs related to the start up would be amortized and expensed over several years, Legal Aid Manitoba will require funding to create a new office. Based on the department's previous experience, a start up cost of $10,000 per staff person was assumed.

7.2.4.3. Results and Implications

A summary of the results of various scenarios is provided in the attached Appendix M. Twenty-one variations using the new certificate production office approach were run and three scenarios using the hourly rate per lawyer approach were run.

Before discussing the details of the results, a number of important qualifying comments are presented.

It is important to note that, despite what may be concluded from a simple cost comparison between service delivery models, there may be other factors to consider when deciding how legal aid services should be delivered.

Firstly, service delivery issues will be very different in Northern Manitoba when compared to service delivery in the City of Winnipeg. The options for providing service in different locations in the province may be limited. In addition, it is not likely that one could rely solely on staff to be able to act on all cases. There will always be situations where there will be case conflicts that preclude staff from representing clients. In such cases there may be no option but to assign the case to the private bar.

Secondly, a monopoly situation would result if Legal Aid Manitoba found itself in the position of having only one available service delivery option, staff or private bar. Once a monopoly situation arises, Legal Aid Manitoba's negotiating power will be reduced. Legal Aid Manitoba has already put itself in this situation with respect to the large complex criminal cases, which are almost exclusively done by the private bar. A certain amount of competition is healthy in the legal aid market. Competition between staff lawyers and private bar lawyers for cases has the effect of keeping prices for legal work at a more reasonable level.

Thirdly, having a mix of staff and private bar lawyers also provides the plan with some flexibility as to how cases are managed. At times when the volume of cases is too high for staff to be able to respond on a timely basis, the plan has the option of sending cases to the private bar. In addition, if caseloads drop significantly, Legal Aid Manitoba is not faced with the problem of surplus staff lawyers.

Finally, a major advantage to having staff provide the service is that there is a greater ability for management to control the workflow and therefore exert some control over costs. Costs are more predictable in a staff system as opposed to a judicare system.

Moreover, one should not discount the risks associated with a major change in service delivery. The private bar is likely to have a negative reaction to any significant change in the service delivery mix between staff and the private bar. When British Columbia tried to make such a change, the private bar threatened to strike. A strike would put any cases currently assigned to the private bar at risk. It would also make it impossible to continue to assign cases to the private bar during the transition period when Legal Aid Manitoba is in the process of hiring staff, but not yet able to take on the volume of incoming work. No other province, with the exception of Newfoundland and Labrador, has moved fully from a judicare system to a staff system. As discussed previously, in Newfoundland and Labrador, the move occurred because the legal aid plan was finding it increasingly difficult to find private bar lawyers to take cases. When the private bar demanded a 60 per cent increase in tariff, the province had no alternative but to move to a staff system. The move was not confrontational, as the private bar had shown little interest in taking legal aid cases anyway. The transition still took Newfoundland and Labrador three years to complete.[91]

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[91] Petten, *supra* note 31.

On a related note, there will be significant change management issues both with existing staff and with the newly hired staff in a system with increased reliance on staff. If the change is not well managed, then there is a strong likelihood that a staff model would fail to produce any real savings. The larger the scope of the change, the greater the risk of failure.

The review is now ready to move on to a detailed discussion of the results.

An excerpt from Appendix M is provided below in Table 7.3 for the sake of illustration.

Table 7.3 – Costs of Full Staff Delivery Model

Variable	Criminal Production	Family Production	Average Cost Per Case Criminal	Average Cost Per Case Family	Criminal Savings (Cost)	Family Savings (Cost)	Net Savings (Cost)	Year 1 Transition Costs	Net Savings (Cost)	Start up Funding
New Certificate Production Office Approach										
95/5 split Criminal & Family	280	180	489.95	955.49	960,210	(1,276,825)	(316,615)	(4,306,797)	(4,623,412)	850,000
	250	180	548.14	955.49	529,010	(1,276,825)	(747,815)	(4,306,797)	(5,054,612)	900,000
	300	180	457.62	955.49	1,199,766	(1,276,825)	(77,059)	(4,306,797)	(4,383,856)	830,000
Hourly Rate per Lawyer Approach										
95/5 split Criminal & Family	280	180	479.38	1248.79	1,221,405	(2,813,625)	(1,592,220)	(4,306,797)	(5,899,017)	860,000

As a starting point, both the hourly rate approach and the new certificate production office approach were run assuming a mix of 95 per cent staff and five per cent private bar to determine the potential cost or savings that might be expected from such a change in delivery models. No system runs at 100 per cent staff because of conflicts and, at times, the need for special skills. In the new certificate office approach, a production level of 280 completed cases per lawyer was used for the criminal law office and 180 completed cases for the family law office.

As shown above in Table 7.3, the hourly rate approach and the new certificate office approach both showed that there would be a saving by changing to a staff delivery model on the criminal side of between $960,000 (the new certificate office approach at the 280 production level) and $1.2 million (the hourly rate approach). On the family side, both approaches showed a **cost** to convert to a staff system ranging from almost $1.3 million in the new certificate office approach to $2.8 million in the hourly rate approach. Overall, both approaches showed a net cost to convert combined criminal and family cases to a 95 per cent staff to five per cent private bar mix, ranging between $317,000 for the new certificate office approach to $1.6 million for the hourly rate approach. These net costs are before the consideration of transition costs, which the review deals with below.

The difference in the cost on the family side between the approaches is attributed to the cost of the staff lawyers. The new certificate office approach assumes a high proportion of junior staff lawyers whereas the hourly rate approach uses the costs of the current staff complement, which reflects a high proportion of senior staff. Regardless of the approach used, however, the average cost per case for staff lawyers for family cases was higher than the average cost per case for private bar lawyers in family cases. It is this higher cost per case in family matters across the approaches that results in the increased cost of a move to a full staff delivery model.

A more detailed discussion of family law costing as compared to criminal law costing is provided below.

7.3. Family Law Costing

The methodology suggests that family law is less expensive when done by the private bar. In fact, it is fair based on the results to consider moving family lawyers over to the criminal side and having the private bar deliver family law services. The reason for not recommending a move in this direction has to do with the sustainability of the plan, that is, having participating private lawyers to deliver services. Both family lawyers and legal aid staff inside and outside Winnipeg advise that it is getting increasingly difficult to find lawyers prepared to take on family law cases. This is a particular difficulty outside of Winnipeg. This inability to find private bar lawyers is probably due to two things: the level of the tariff and the fact that fewer lawyers appear to be going into family law practice. The latter point was provided anecdotally by a number of lawyers but could not be empirically verified. In any event, simply maintaining some level of staff will be needed in the family area.

This trend is concerning. Over the longer term, there will be a need to have a functioning private bar in the family area because of the issue of conflicts. For example, it is conceivable that many couples involved in a family law dispute will both be represented by legal aid, either by two private lawyers or a private bar lawyer and a staff lawyer. If all of these cases were to be handled by staff lawyers, steps would have to be taken to deal with the fact that a conflict would exist when two staff lawyers represented each party.

Newfoundland and Labrador and Saskatchewan both face this problem. The solution employed by both provinces has been to use staff lawyers from different offices to represent clients in the same case, and to structure the offices as separate. For example, in both Saskatoon and Regina, the Saskatchewan Legal Aid Commission maintains two offices, a city office and a rural office. While the offices may be in the same building, they are not on the same floor and they have separate libraries and computer systems. Thus, for example, a staff lawyer from the city office could act for the husband in a particular family matter and a staff lawyer from the rural office could act for the wife in that same matter. In areas outside of the larger cities, a lawyer from a legal aid office in one town can act for one party and a lawyer from a legal aid office in another town can act for the other party.[92] Obviously, having thirteen offices is a significant asset for the Saskatchewan program. For Manitoba, in contrast, if legal aid were to act on both sides of a family matter outside of Winnipeg, either a second office would need to be established where each regional office currently exists, or parties would have to be assigned to offices in different municipalities. To illustrate this by way of example, for a family matter originating outside of Winnipeg in the community of Russell, the wife in a particular family matter could be served by the Dauphin regional office while the husband could be served by the Brandon regional office. While this is a possibility in some regions of the province, it would become very difficult to operationalize in the North. Since staff lawyers are more costly in family matters, it would not appear to make sense to go through this effort.

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[92] Interview with Jane Lancaster, Q.C., Chief Executive Officer of the Saskatchewan Legal Aid Commission, February 10, 2004.

Given the current situation with respect to the practice of family law, Legal Aid Manitoba would have difficulty finding a sufficient number of private bar lawyers to assume the caseload in the family area.

The significant difference in the average cost per case on the family side might be due to two factors that could change over time. The first is a tariff that may not adequately recognize the costs to provide service in the family sector and the second may be the production levels of staff lawyers in the family offices. It is possible that, given the nature of family cases, the staff lawyers may be providing a greater level of overall service to the family client, addressing more than the specific service noted in the certificate, whereas the private bar lawyers, because of the level of the tariff, provide only the absolute specific service required on the certificate. While the review did not specifically analyze the reasons for the difference in costs, it is important that Legal Aid Manitoba examine the reasons for the gap more closely in order to both ensure that a functioning private bar is available to take family cases and staff productivity is maintained.

In order to keep a functioning private bar, the tariff may need to be amended. As briefly discussed in Table 2.1, which was presented in Section 2 of this report, the number of lawyers accepting civil certificates, which are predominantly family certificates, has declined from 475 in 1994 to 192 in 2003. The number taking more than five certificates has gone from 234 to 104. Finally, in 2003, only 12 lawyers were taking more than 100 family certificates per year.

Given that the private bar is less expensive in delivering family law at this time and the difficulties in dealing with conflicts in a higher staff component, the review did not pursue scenarios with an increased staff component on the family side and in fact recommends no change in the mix for family cases. This comparison and recommendation could change over time with changes in the tariff and, perhaps, staff practices.

7.4. Criminal Law Costing

The hourly rate approach and the new certificate office approach both show that overall, on criminal cases, staff lawyers are less expensive than the private bar. As mentioned earlier, however, the approaches do not include the cost of large cases, which will be considered separately.

Care should be taken in concluding that staff is less costly than the private bar, however, because that may not always be true. Staff is less expensive than the private bar at certain productivity levels. As can be seen in Appendix M, showing the results of the various scenarios, if staff productivity drops below 280 files per lawyer per year, any potential savings begin to quickly disappear. Also, as noted previously, the new certificate office approach assumes a high proportion of junior lawyers to senior staff in the office. As time passes, and those lawyers gain seniority, the salary levels increase and the savings begin to shrink. This decline in the savings will be more pronounced should productivity levels also begin to decline. In the absence of staff turnover, declines in productivity may well occur. As staff seniority increases, vacation allowances and the likelihood of major sick leaves also tend to increase. The effect of salary increases will be examined in more detail later in this section.

The issues discussed on the family side relating to sustainability, the need for flexibility, the difference in how services are delivered in rural Manitoba and the need to ensure that there is competition in the market are the same for the criminal work.

7.4.1. Transition Costs

The analysis so far has not discussed the impact of transition costs on the results. Transition costs relate to the ongoing costs for private bar cases that have not yet been billed in any given fiscal year. These billings will continue for some time after any conversion to a staff system and in effect, Legal Aid Manitoba will be absorbing the cost of the salaries for the new staff as well as the costs for outstanding billings for private bar work assigned before changeover. The transition costs can be expected to continue for up to six years after the conversion, at a declining amount each year but they will be substantial for the first three years. If, as suggested above, the service delivery were only changed on criminal cases, and the caseload mix was changed to 95 per cent staff and five per cent private bar, the transition costs would be as follows:

Year 1	$2,278,200
Year 2	$650,600
Year 3	$220,400

At a productivity level of 280 cases per lawyer, it would take over three years for Legal Aid Manitoba to begin to realize any net savings from the conversion, assuming there were no staff salary increases during that period.

7.4.2. The Ten Staff Lawyer Office Scenario

The review examined the various scenarios presented in Appendix M to determine which might provide the greatest potential for savings at the least risk and a limited initial outlay.

Absent transition costs, the higher the proportion of staff delivery of criminal cases, the greater the savings. However, as one of the objectives was cost neutrality the review needed to take account of transition costs and these costs increase as the ratio between staff and private bar increases. With a view to achieving cost neutrality, the review looked at various ratios of staff/private bar to see if savings would be greater than transition costs in any given year. The review was unable to attain total cost neutrality. At the point where ten new staff lawyers are added (specifically under the new certificate office approach) the potential benefit from the changeover is reasonable and the transition costs are not as high as at a full conversion.

At an office size of ten new legal staff, there should be a sufficient volume of certificate work being absorbed by staff to result in a sufficient savings, without Legal Aid Manitoba being overwhelmed by the management issues related to managing productivity of a large group of staff. If the addition of staff were any smaller, there is a risk that the new staff will be used to simply absorb workload from current staff caseloads. Adding ten additional criminal staff lawyers would change the mix from 60/40 private bar to staff to 60/40 staff to private bar. Given the potential benefits of this option, it was examined further.

It is important to note that the cost per case for this office will be slightly more than the cost per case in the theoretical new certificate office approach described earlier. The cause of the increase in cost is a slightly greater proportion of senior legal staff. The starting average cost in this staff lawyer office scenario is $520.71 per case.

The ten person office scenario was extended over ten years to determine what the overall savings might be. Staff was assumed to receive annual increments that would move them through the various steps within their classifications as they gained seniority. For the legal staff, it was assumed that, once they had reached the maximum salaries within their classification range, then they would move to the next classification. In addition to the annual increments, salaries were increased by three per cent per year. Operating costs were increased by one per cent per year, starting in year three and the criminal tariff was increased by three per cent per annum. After ten years, the total savings (cost), net of transition and start up costs, at the various production levels was determined to be:

• At a production level of 250 files per lawyer	$(653,800)
• At a production level of 280 files per lawyer	$1,258,700
• At a production level of 300 files per lawyer	$2,556,000

The generation of these calculations for various levels of production is outlined below in Table 7.4 below.[93]

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[93] The assumptions for all three approaches are as follows: staff receive annual increments until they reach the maximum for the classification; lawyers move to the next classification range once they maximize their current classification range; salary increases are three per cent per year; operating increases are one per cent per year starting in year three; and the annual tariff increase is three per cent.

Table 7.4

Production rate - 250

Years	1	2	3	4	5	6	7	8	9	10	Total
(Cost) savings	181,717	144,764	131,552	96,101	60,392	29,724	-(6,256)	-(24,179)	-(56,631)	-(121,292)	
Transition costs	-(660,677)	-(188,663)	-(63,908)	-(30,575)	-(15,974)						
Net (cost) savings	-(478,960)	-(43,899)	67,644	65,586	44,418	29,724	-(6,256)	-(24,179)	-(56,631)	-(121,292)	
Start up funds	-(130,000)										
Total (cost) savings	-(608,960)	-(43,899)	67,644	65,586	44,418	29,724	-(6,256)	-(24,179)	-(56,631)	-(121,292)	-(653,845)

Production rate - 280

Years	1	2	3	4	5	6	7	8	9	10	Total
(Cost) savings	362,004	330,201	322,139	291,898	261,279	235,762	204,932	193,876	168,291	110,497	
Transition costs	-(751,805)	-(214,685)	-(72,723)	-(34,793)	-(18,177)						
Net (cost) savings	-(389,801)	115,516	249,416	257,105	243,102	235,762	204,932	193,876	168,291	110,497	
Start up funds	-(130,000)										
Total (cost) savings	-(519,801)	115,516	249,416	257,105	243,102	235,762	204,932	193,876	168,291	110,497	1,258,696

Production rate - 300

Years	1	2	3	4	5	6	7	8	9	10	
(Cost) savings	482,195	453,825	449,197	422,389	395,204	373,121	345,724	339,426	318,239	265,023	
Transition costs	-(797,369)	-(227,697)	-(77,131)	-(36,901)	-(19,279)						
Net (cost) savings	-(315,174)	226,128	372,066	385,488	375,925	373,121	345,724	339,426	318,239	265,023	
Start up funds	-(130,000)										
Total (cost) savings	-(445,174)	226,128	372,066	385,488	375,925	373,121	345,724	339,426	318,239	265,023	2,555,967

As can be seen from the results of applying the methodology, the potential for savings is directly related to the ability of Legal Aid Manitoba to maintain the productivity of the staff lawyers.

As Allan Fineblit states in the Ontario report:

> In the discussion of cost, there has not been much attention paid to productivity. When testing delivery models, as is now being done in B.C. and Ontario, the pilot projects must be designed with reasonable productivity expectations in order to fairly test the comparative costs. When productivity has been considered, those who support a private bar model argue for low productivity expectations from staff lawyers in order to ensure quality of service. This seems a bit unreasonable given that many private bar

> lawyers carry large legal aid caseloads. If it is reasonable for a private lawyer to handle 300 legal aid cases a year, then it is reasonable for a staff lawyer to be expected to produce at similar levels.[94]

Although it was difficult to obtain target caseload numbers from many of the plans in Canada, Saskatchewan advised that their staff is expected to complete between 300 and 310 cases per year.[95] It is important to note that Saskatchewan staff handles a mix of cases both criminal and family, whereas Manitoba staff lawyers, at least in Winnipeg, specialize in either criminal or family cases.

Legal Aid Manitoba, as noted earlier, has set target rates of 280 for criminal lawyers and 180 for family lawyers. The target rates have been set taking into account the other duties that the staff lawyers must perform, including duty counsel, working at the drop-in centre and providing outreach service. In the new certificate office approach, the lawyers would only be providing certificate work, and one could assume that the production levels should, therefore, be greater than the current 280 cases per lawyer. The data gathered to develop the costing approaches would suggest, however, that Legal Aid Manitoba is not meeting the current target rates for criminal cases. This should be of concern, as, if the change in the mix of staff to private bar is to provide any savings, then there must be some certainty that a reasonable productivity level can be maintained at all times.

The costing approaches are not static and the potential savings or cost will change if one of the variables, that is, the productivity of the staff, the salary levels for staff lawyers or the tariff paid to the private bar, changes dramatically or if one variable changes in a way that is out of step with the other variables. At that point, the viability of the delivery model or level of mix of service delivery will have to be re-evaluated. The potential for significant changes in one of the variables of the service delivery model only reinforces the need to ensure that the plan has flexibility in how service is provided.

7.5. Larger Cases

The review now moves on to a general discussion of larger cases and larger case terminology, including a discussion of costs and cost implications of these larger cases.

As mentioned above, in calculating the average cost per case, it became necessary to separate out two types of particularly high cost cases that would otherwise have seriously skewed the results. Large cases fall into two broad groups. The first group are those that will be referred to as "systemic high cost cases", that is, the 39 cases that cost in excess of $10,000 each and together consumed a disproportionate amount of legal aid funding. Also making them unhelpful for comparison purposes is the fact that these had all been carried by private bar lawyers as there were no staff lawyers in Winnipeg who were able to conduct them. The other, much smaller, group will be referred to as the "mega-trials", given that this is the term most commonly associated with them by the media and the public. By these the review means those unusual and extremely complex and high cost cases that involve multiple accused, very lengthy trials and voluminous evidence.

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[94] Fineblit, *supra* note 75 at 75.

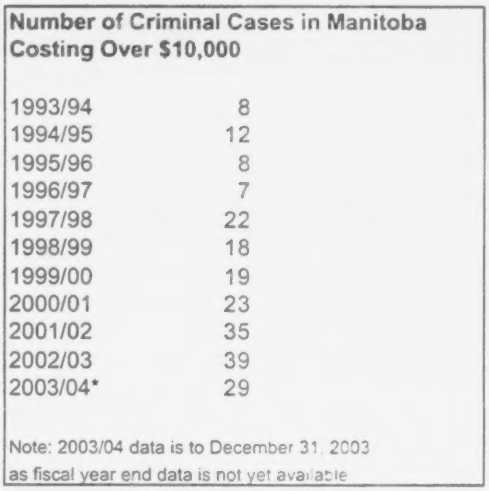
[95] Interview with Jane Lancaster, Q.C., Chief Executive Officer of the Saskatchewan Legal Aid Commission, February 10, 2004. See also: D. Rolsten, *Strategic Needs Assessment for the Saskatchewan Legal Aid Commission* (October 1999) at 4.

7.5.1. The "Systemic" High Cost Case

Legal aid expert Albert Currie conducted a preliminary study of what he terms the "systemic high cost cases" in three provinces in the late 1990's, finding that these are "a constant feature of legal aid cost structures."[96] He notes that "[l]egal aid plans tend to define this type of high cost case by a somewhat arbitrary definition based on a cost threshold", noting that British Columbia defined a high cost case as one costing over $10,000, Ontario used $20,000 as its threshold, and New Brunswick used $5,000.[97] As is the case in Manitoba, Currie's research found that most systemic high-cost cases involved homicides or criminal appeals.

The number of high cost criminal cases in Manitoba has steadily increased since 1993/94. The history of the high cost criminal cases for Legal Aid Manitoba from 1993/94 to present is presented below in Table 7.5.

Table 7.5



Number of Criminal Cases in Manitoba Costing Over $10,000

1993/94	8
1994/95	12
1995/96	8
1996/97	7
1997/98	22
1998/99	18
1999/00	19
2000/01	23
2001/02	35
2002/03	39
2003/04*	29

Note: 2003/04 data is to December 31, 2003 as fiscal year end data is not yet available

Currie describes a series of systemic factors that may inflate the costs of such cases over time. Private bar lawyers may develop a tendency to do and bill as much work as the tariff will allow[98], even when such work might not be done were the individual client paying the lawyer's fees. Legal aid policies may also have insufficient controls to ensure that unnecessary work not be done or that the work be done as efficiently as possible, also contributing to cost escalation.[99]

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[96] A. Currie, "Factors Driving High Cost Legal Aid Cases: Preliminary Assessment Justice Canada Research and Statistics Division, Policy Sector, April 1999. Accessed at http://www.justice.gc.ca/en/ps/rs/rep/tr98-10a-e.pdf [hereinafter High Cost Legal Aid Cases].

[97] *Ibid* at 1.

[98] *Ibid* at 6.

[99] *Ibid.*

Manitoba applies block fee tariff rates for what are deemed Category A offences.[100] These tend to be the higher cost cases. Other cases that have been included in the Manitoba large case count include such things as dangerous offender hearings, faint hope applications and gang related conspiracy charges. As discussed in the section on tariffs, *The Legal Aid Regulation* provides for the executive director to apply discretionary increases (enhancements) to the tariff. Enhancements are most commonly applied to Category A offences and to the large cases. The regular use of enhancements for large cases has likely resulted in the costs associated with large cases increasing over the years. In interviews with representatives from the private bar, there were concerns expressed as to how Legal Aid Manitoba determines the amount of an enhancement paid on a case and whether the enhancements are paid equitably.

Currie further notes that the following developments in criminal law and procedure have increased the complexity and cost of criminal cases over time:[101]

- developments in criminal procedure, an example being the rules governing Crown disclosure of its evidence set out in the *Stinchcombe* decision of the Supreme Court of Canada whereby defence lawyers now typically review all of the evidence the police have gathered for the case
- the myriad of new defences that the *Charter* has made possible in a criminal trial
- the growth in complex scientific evidence such as DNA evidence, which involves testing costs and the need for expert witnesses and leads to increased complexity of the court proceeding.

Finally, Currie notes that prosecution policy may have an effect on case complexity and cost. For example, in some jurisdictions many separate charges are often filed, the number of witnesses and amounts of evidence may be very high, and appeals may be frequent. These practices have an obvious impact on the costs of defending the case.[102]

Where Canadian jurisdictions have responded to the challenges of systemic high cost cases, they have tended to adopt "case management" procedures. Legal Aid Ontario's "Big Case Management" (BCM) program requires lawyers accepting criminal certificates to notify them if the preliminary hearing is likely to take more than two weeks and if the total fees and disbursements will exceed $20,000.00 for any charge other than first or second degree murder, $30,000.00 for first or second degree murder, and $50,000.00 (for all accused) where there is more than one accused person. A budget must be negotiated for the case and there is a ceiling of $75,000.00. If a case is not eligible for BCM, the usual tariffs and caps will apply.[103]

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[100] "Category A" offences were defined in Section 7.1 of this report.

[101] High Cost Legal Aid Cases, *supra* note 96 at 6-7. It is widely accepted that both civil and criminal litigation is becoming increasingly complex. See: B. Roe, "Handling the Mega File", *The Saskatchewan Advocate*, December 2002.; Discussing the results of a recent survey by the Canadian Bar Association of its members concerning legal aid, Melina Buckley notes that one of the two main reasons lawyers gave for refusing to take legal aid cases was that the files were too complex for the hours available under the legal aid plan. (Buckley, *supra* note 2 at 67.. Buckley also mentions that Legal Aid Manitoba has reported having to agree to pay above the legal aid tariff in order to secure a lawyer to represent an accused in a complex criminal case (Buckley, *supra* note 2 at 39). Indeed, in *R. v. Rowbotham* [1988] O.J. No. 271, the Ontario Court of Appeal pointed to the "increase in the length and complexity of modern trials and the increase in overhead costs" in finding that "the appointment of counsel to act without remuneration is no longer feasible and, indeed, in many cases, would be unfair to counsel."

[102] High Cost Legal Aid Cases, *supra* note 96 at 7.

British Columbia's Legal Services Society similarly applies its Strategic Case Assessment Program to the most serious cases, such as homicide, where the anticipated length of the preliminary hearing or trial exceeds 10 half-days of court time. Such cases are managed on an ongoing basis through advance budgetary decisions reached collaboratively between legal aid staff and the private bar lawyer assigned to the case.[104]

In Manitoba's case, the reviewer understands that Legal Aid Manitoba is considering some type of big case management procedure. Other policy changes would also likely assist in controlling the costs of these high cost cases. The first and most obvious need is to develop the capacity to handle these cases by staff lawyers. Without this ability, and the potential for cost comparisons that it would afford, it becomes very difficult to judge what is necessary to carry through one of these cases and to develop tariffs and determine what level of exceptional fees is appropriate. The second obvious step, once there is a capacity for staff lawyers to handle these cases, is to revise the tariff so that it better reflects the usual costs for these types of higher cost cases and to develop the expectation that the tariff will be adhered to. Exceptional fee enhancements should also be truly exceptional and strictly controlled through a fair, documented, and transparent procedure. The redesign of the Category A tariff should not increase costs for large cases as the money is already being spent. It will, however, put some controls on the costs for large cases. It will make the costs more predictable and limit the upward push in costs that results from not having a set fee schedule that is reasonable and understood by all parties.

It must be noted that Legal Aid Manitoba may need to direct these cases to staff lawyers in order for this policy change to work effectively. As long as competent counsel is provided, and conflicts of interest are avoided, there should be no statutory or constitutional impediment to doing so. The ten person separate certificate office, discussed in the section on costing, may provide Legal Aid Manitoba with some limited ability to assume some of the larger cases. The certificate office is intended to be a separate office from the current Criminal Law Office located in Winnipeg and therefore could resolve some of the conflict issues that may arise in large cases. As previously noted, the new certificate office must be a high production office in order to achieve any savings. Assigning large cases to senior staff in the office will decrease the production rate for the office; however, it is possible that the savings that could result from conducting a large case in house as opposed to assigning the case to a private bar lawyer could result in equal or greater savings than from simple processing of certificate work. In the new certificate office model, the average cost per case at a 280 file production level was $520.71 as compared to the private bar average cost of $619.57, a difference of $98.86 per case. At a production level of 280 cases, a staff lawyer would save the plan approximately $27,700. If completing one or more large cases would save the plan more than the $27,700 from regular certificate work, then it would be of benefit for the staff lawyer to do the large case. The actual mix of large cases to certificate work would be a management decision and would depend on the length of time required to complete a large case. Should it prove to be economically beneficial for legal aid staff to do more large cases, then additional senior lawyers may be required.

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[103] Legal Aid Ontario, Tariff and Billing Handbook, August 28, 2002, 3-23 to 3-24.

[104] Association of Legal Aid Plans of Canada, *Background Materials for Annual Meeting. August 25, 26 and 27, 2003, Winnipeg, Manitoba*, Provincial and Territorial Reports, Tab 5.

7.5.2. The "Mega-Trial"

While he does not include them in his study, Currie also describes exceptionally high cost cases that arise from time to time, giving examples such as conspiracy cases involving multiple co-accused, or murder cases with complex DNA evidence and expert witnesses.[105] These have become more commonly termed the "mega-trial". In the case of *R. v. Trang*[106], Binder J. describes a mega-trial as "a large complicated trial involving thousands of documents and hundreds of thousands of intercepted communications which may take years to complete". He noted that the mega-trial has emerged as a result of "the advent of the *Charter* and its application in large conspiracies, and organized crime and terrorism legislation."[107]

Similarly, many individuals whom the reviewer consulted identified a small, unpredictable and fluctuating number of very high cost cases in Manitoba that are almost certain to be eligible for state-funded legal representation, even where the accused is financially ineligible for legal aid. These typically feature an unusually lengthy trial (i.e. taking two or more months as opposed to one to two weeks to conclude) due to some combination of the following factors:

- the prosecution of a number of co-accused together
- complex legal and/or procedural issues (e.g. constitutional challenges, numerous and/or complicated charges, such as conspiracy, and/or intricate evidence-related questions)
- unusually voluminous or complex evidence (e.g. involvement of expert or child witnesses, need for technological expertise or equipment)

The review notes with interest that Quebec's recent report to the 2003 Annual Meeting of the Association of Legal Aid Plans of Canada similarly referred to the challenge posed to the legal aid tariff by "practice breakers", and described these as cases involving voluminous evidence, unusually extensive preparation time and lengthy trials.[108] The term “practice breakers” is based on the claim that it is difficult for a lawyer to work on a trial of this size and maintain a practice. At the end of the trial the lawyers say that they could end up without any clients, having spent all their time on the mega or practice breaking trial.

These cases, even if they may at times be obviously complex and expensive from the outset, are difficult to provide for adequately in legal aid budgets. Firstly, they are rare and varied. The number, nature and cost of such cases will fluctuate considerably from year to year. Secondly, given the length and complexity of the trial, the accused, whether financially eligible for legal aid or not, may well be able through either a threatened or actual *Charter*-based *Fisher* application to negotiate the provision of government-funded lawyers at significantly higher than the legal aid tariffs and caps, at least where adequate representation cannot be made available within the staff lawyer component of legal aid. Thirdly, even were there capacity to represent all of the accused within the staff lawyer component of a legal aid system, professional ethics governing conflict of interest may prevent legal aid staff lawyers from representing some or all of the accused involved where their interests conflict with those of one another or with other clients of legal aid.

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[105] *Ibid.*

[106] [2003] A.J. No. 1183 at para. 18.

[107] *Ibid* at para. 21.

[108] Association of Legal Aid Plans of Canada, *Background Materials for Annual Meeting, August 25, 26 and 27, 2003, Winnipeg, Manitoba*, Provincial and Territorial Reports, Tab 5.

At least one Canadian jurisdiction has put in place measures to control the overall costs of this type of case. British Columbia's provincial government and Legal Services Society (LSS) concluded a Memorandum of Understanding that puts in place a special policy and dedicated budget line for "exceptional matters". Exceptional matters are defined as involving one of the following characteristics: representation required by the *Charter* right to counsel for individuals who are financially ineligible for legal aid; cases where the degree of complexity involved, a court order or an agreement by the government requires payment of fees that exceed the standard limits set by LSS policies; total fees, disbursements or both exceed $50,000.00; or an unusually large number of similar cases together will result in higher than normal costs.[109] The LSS is further required by the agreement to establish an advisory group of private bar lawyers to determine, on the basis of the LSS's criteria, whether the case requires a senior lawyer, whether a particular lawyer has the necessary qualifications for a particular case, and whether he or she is entitled to the senior counsel rate.[110]

It is important to recognize here that other sectors of the justice system such as the judiciary and prosecutions have felt the impact of these trials and are placing a high priority on developing appropriate policies and procedures for simplifying and streamlining this type of proceeding.[111] As a result, it may make more sense to deal with legal aid concerns regarding these very rare cases within the broader policy exercise focusing on the mega-trial. It certainly seems appropriate to allocate resources for publicly funded legal assistance in relation to these trials on a case-by-case basis as is done within the other sectors of the justice system.

That being said, the recommendations for dealing with systemic high cost cases will also be of some benefit in relation to these cases. Some capacity to direct and deal with these cases within the staff lawyer component of Legal Aid Manitoba would make cost comparisons possible and prevent a situation where the government must choose between paying what the private bar demands and staying the charges.

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[109] *Ibid.*

[110] *Ibid.*

[111] Chief Justice Monnin of Manitoba's Court of Queen's Bench identified the mega-trial as one of the most significant pressures on the administration of justice in the courts today in his address to the Manitoba Bar Association's Mid-winter Conference at the Hotel Fort Garry, Winnipeg, Manitoba, on January 30, 2004; Please also see Department of Justice Canada, "2003-2004 Estimates: a Report on Plans and Priorities", accessed at http://www.tbs-sct.gc.ca/est-pre/20032004/Jus-Jus/Jus-Jusr34_e.asp. In the section setting out priorities for fighting organized crime, the complexity and length of criminal organization trials and the concomitant need for extensive and timely disclosure of the government's evidence are noted as significant challenges. As a result, it is noted that prosecutors and investigators need to keep cases as manageable as possible by reducing the number of accused, the scope of allegations, the volume of evidence etc. Federal-provincial-territorial consultations on how to manage complex prosecutions and the development of a best practices handbook for managing such cases are among the strategies highlighted by the department for the coming year.

8. Governance and Independence

While a review of governance (that is, the general oversight of the plan) was not directly part of the mandate for this review, the importance of productivity in the analysis highlighted governance as the key to successful implementation of any significant change to legal aid operations.

Governance and independence are important in three respects, both for Legal Aid Manitoba today and if it moves to a greater staff component. The strength and ability of the Board of Directors (Legal Aid Manitoba's governing body) to manage changes can be assessed by answering the following three questions:

- First, is Legal Aid Manitoba sufficiently independent of government in its main task of providing legal services to indigent persons?
- Second, is the Board able to ensure performance? Productivity is central to any move to a greater staff component. Productivity depends to a great extent upon effective management. Management is accountable to the Board. Does the Board have the appropriate policies and processes in place to hold management accountable?
- Finally, does the Board have sufficient autonomy so that it can be reasonably held accountable for performance of the organization by government?

8.1. Independence from Government

On the first issue of independence from government, much of the current literature on governance and independence is related to the question of whether a law society or an independent commission should ultimately be responsible for legal aid in a particular province. We are beyond that debate in Manitoba and, indeed, in most of the rest of the country. From its inception Legal Aid Manitoba has been governed by an independent board with nominees from the Law Society of Manitoba and persons appointed by the government.

Manitoba's Board is as independent as any other board. As Allan Fineblit writes:

> The point is that the governance of a legal aid by an independent board or commission does not ensure independence when the board membership, mandate, tariff, eligibility, staffing or funding is controlled by government. It is worth noting, however, that when most people think about the independence issue what immediately comes to mind is a telephone call from the Attorney General, to his political crony chairing the Legal Aid Board, asking her not to fund the defence of an accused in a high profile case. It never happens. In twenty years at Legal Aid Manitoba, ten of them as Executive Director, working under four different administrations and seven different Attorneys General, not once was such a call ever made, nor have I ever heard of such a call in any other Canadian jurisdiction.[112]

Fineblit goes on to observe:

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[112] Fineblit, *supra* note 75 at 72.

> The willingness of government to fund legal aid plans depends on many complex factors. My own observation has been that the credibility of the governing body of the legal aid plan with government is a very important factor in determining the level of funding that will be made available. In Manitoba, the closeness of the board members and, in particular, the chair, to the government of the day is what establishes that vital credibility.[113]

The British Columbia Legal Services Society Governance Policy makes similar points. It states:

> The need for independence in the administration of legal aid has traditionally been linked to the need for government to not control— or not be seen to control—the funding of legal aid representation, given that the Crown is adverse in interest to the accused. While this is an important rationale, it is not a sufficient justification for an independent society to administer legal aid. Systems can, and have been, set up within governments to protect decision-making on government funding of defense lawyers from undue pressure by Crown prosecutors.[114]

The British Columbia policy then discusses how a society funded by government can be independent. According to the policy, in order for a board to successfully be independent the board must have:

> **Clarity of purpose:** If the society has thought through its objectives and strategies, and roots its "independent" positions in its statutory objects, the society's assertion of independence has a legitimacy that is difficult for government to undermine.
>
> **Accountability:** The government funds the society because the society is undertaking core responsibilities of government. The society must be able to show government that the funds it provides are being used for the purposes that the legislature and government intended. Lack of accountability to government is likely to lead government to infringe on the society's independence. Conversely, if the government perceives that the society is meeting its objects, it will be more comfortable allowing the society wider discretion in how it pursues these objects. Accountability does not preclude independence; it supports it.
>
> **Clarity of expectations and mutual understanding of interests:** The society will be better able to function independently within its sphere of influence if the government's expectations are clearly defined and understood. The Memorandum of Understanding is an instrument for clarifying government's expectations. The society will likely accommodate its independent interests in the Memorandum of Understanding with government if it understands government's interests, clearly conveys its own interests to government, tying them to its statutory mandate, and identifies common interests with government.
>
> **Public support:** The government seeks accountability from the society because it, in turn, must be accountable to the public for the use of public funds. Public support for the society will increase government's willingness to permit the society to function independently.

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[113] *Ibid.*

[114] See: Legal Services Society of British Columbia, "Legal Services Society Governance Policy" at 1.

> **Legal profession engagement:** The provision of legal aid was seen historically as an obligation of the legal profession — an obligation related to the privilege of self-governance. Independence in administering legal aid was, therefore, connected to the accepted independence of the legal profession. Engagement of the legal profession in the business of the society and advocacy by the profession's governing bodies with government on behalf of the society are important counterbalances for the power that government exerts as a result of being the primary funder of legal aid. While the legal profession's support of legal aid is an important tool for LSS' independence from government, LSS must also be independent from the legal profession. Lack of independence from the law society is not only inconsistent with the act, but also risks loss of public (and therefore government) support. The society must avoid being perceived as "for lawyers." It must be keenly aware of its statutory mandate to serve the interests of low-income individuals.
>
> **Demonstration of effectiveness:** Government (and the public and the legal profession) will more likely respect the society's control over the means of pursuing its objectives if the society is, and is demonstrated to be, effective in fulfilling its objectives.
>
> These prescriptions for enhancing independence from government are also prescriptions for good governance. Independence will more likely be achieved if the society has:
>
> - directors who understand that their fiduciary obligation is to pursue the interests of the society, not the interests of their appointing bodies; and
>   - a board that —
>   - sets clear direction for the society,
>   - ensures that an executive director (ED) is in place who will implement its strategic plan and effectively administer the society,
>   - monitors the society's performance,
>   - manages the risks of the society, and
>   - communicates effectively with government, the legal profession, the public, and other stakeholders.
>
> Good governance requires the society to be independent; independence is achieved by good governance.[115]

The reviewer believes Legal Aid Manitoba is independent in its core functions. The British Columbia Board Legal Services Society Board Governance Manual[116] is a reference that may help the board ensure that independence can be maintained and enhanced.

8.2. Holding Management Accountable

The second issue of the board's ability to hold management accountable goes to what is normally thought of as the governance function, the general oversight of an institution to ensure it is achieving it objectives. The review has noted that staff productivity is central to the success of a greater staff component in the service delivery model. Ensuring such productivity requires dynamic leadership and good management. It follows that good governance is needed to ensure this leadership and management. A governance or management audit was not conducted as this was not within the terms of reference, but the review notes that some of the attributes of good governance that the literature suggest should be in place for an organization like Legal Aid Manitoba. The governance attributes are as follows:

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[115] *Ibid.*

[116] See: British Columbia Legal Services Society, *Board Governance Manual*.

- a clear statement of vision, mission and goals
- a strategic plan or strategic planning process
- a clear, legislated statement on the scope of core services
- by-laws for the board of directors
- stability at the position of chair of the board
- a board orientation manual for new board members to ensure that they are adequately prepared to fulfil their governance responsibilities
- knowledge of what good governance means
- a focus on big-picture policy issues rather than operational details
- a performance evaluation process for the executive director by the board
- a performance evaluation process for board members
- a clear understanding of the respective roles of the board and the executive director
- members with business or financial management expertise (the lack of these skills on the board can impair the ability of a board to adequately scrutinize financial statements and have a clear understanding of current financial realities, past trends and future projections)
- members with expertise on the social and economic circumstances associated with the special needs of low income individuals
- a cohesive board without factionalism (insiders and outsiders)
- policies to ensure that political agendas do not interfere with the board's responsibility to serve the best interests of the organization
- good communication with important stakeholders, in Legal Aid Manitoba's case the private bar

The Legal Aid Manitoba Board may wish to determine whether such attributes are in place.

The position of Chair of the Board is key. The reviewer was told that there has been some difficulty in appointing a permanent Chair for Legal Aid Manitoba. The Board has been without a permanent chair for almost a year and the former Chair was in place for less than a year. The reviewer understands that several people have been offered the position but have not accepted. In one of the interviews conducted for this review, the Chair of another commission suggested that the position required more than a few hours a week. Given the difficulty in finding a suitable Chair and the difficulties Legal Aid Manitoba has encountered in the recent past, consideration might be given to appointing a full or almost full time Chair for the next year or two. Such an appointment might make the position more attractive in that the appointee might feel that he or she had both the mandate and the capacity to do whatever was necessary to ensure good governance.

A smaller, but important, issue that arose during the consultations was the questions of appeals. Appeals now take up a significant amount of Board time. The reviewer believes that a process that did not take up the whole Board would serve Legal Aid Manitoba better in that the Board could then concentrate on its core function of governing Legal Aid Manitoba. A suggested approach would be to have appeals handled by a subcommittee of the Board. At first blush this seems reasonable, but Legal Aid Manitoba may wish to look at other models. In any event, the reviewer does not believe appeals should occupy the time of the whole Board and that the legislation should be amended accordingly.

While legal aid boards have always recognized the need for representation from stakeholder, lawyer and client groups on the board, the benefit of other expertise has not always been recognized. Roger Smith of the England and Wales legal aid plan has some interesting observations on the benefits of members with business, management or administrative experience. He states:

> The establishment of a Legal Aid Board packed with management expertise has encouraged the Lord Chancellor's Department to allow more autonomy of operation. This has been assisted by a more general move within government thinking to devolve administrative operations away from government to more independent units, generally known as agencies. In relation to legal aid, this has been beneficial and there can be no doubt that the board is now a competent administrator deploying modern management techniques in a way that the Law Society was not.[117]
>
> In my view, therefore, the best model for delivery would be a board of about twelve members, appointed by the government ministers but—for at least some places—after consultation with various interest groups. Ministers should accept the need to create an independent body and genuinely seek to encourage this in their appointments. The board should appoint its own chief executive. My experience of the English board has altered my view of the value of importing management expertise from business: I think it is extremely valuable.[118]

The review looked at other legal aid statutes. The British Columbia *Legal Services Society Act*[119] came into force on May 9, 2002 and is the most recent significantly revised act among the Canadian provinces. The British Columbia legislation and some of the policies and procedures that have flowed from it on the question of governance are worth considering. The review includes a summary of these provisions in Appendix N for the information of the Government of Manitoba and the Board.

8.3. Autonomy and Authority

The third question concerns the autonomy and authority of the Board. Does the Board have sufficient autonomy in managing the plan for the government to be able to fairly hold them accountable for the plan operations? Other plans the reviewer talked to seem to have this autonomy, although it is admittedly difficult to confirm this in an interview. The reviewer was told that most plans operated with a fixed global budget without staff year control. The ability to hire staff as needed, reportedly gives these plans the flexibility to immediately respond to changes in the legal aid market. On the other hand, these plans also said that they were not allowed to run a deficit and were required to make difficult choices when ordinary operations were forecast to go over budget. All plans said that their funders recognized that they could not absorb extra-ordinary expenditures such as the so-called mega-trials. Given the comments from other plans, a question is raised as to whether Legal Aid Manitoba does in fact have a sufficient level of autonomy to manage its plan. In Legal Aid Manitoba's case, the government should consider its relationship with the plan and whether it could be provided with a budget and given the freedom to deliver legal services without the requirement of staff year authorization.

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[117] R. Smith (1997). *You are not Alone: Legal Aid in England and Wales.* In A New Legal Aid Plan for Ontario: Background Papers. Edited by Frederick H. Zemans, Patrick J. Monahan and Aneurin Thomas. Osgoode Hall Law School. York University Centre for Public Law and Public Policy. North York, ON, 1997 at 177.

[118] *Ibid* at 178.

[119] S.B.C. 2002, c. 30.

9. Controlling Future Costs

There are three factors that decide the overall cost of legal aid. One is who is eligible or the number of people served. The second is coverage or what types of services are provided and the third is the cost of delivery. Both questions of eligibility and coverage are subject to constitutional requirements. For the sake of illustration, assume for example, that a government decided it no longer could afford a legal aid plan and was going to abolish legal aid. It is not within the power of the provincial or federal government to stop providing state funded counsel in certain criminal and child protection cases.

A government could decide that it would no longer provide legal services in most areas of family or poverty law. The reviewer has seen that coverage in Canada varies widely in these areas. This decision would have impacts on the operation of the courts, as there would be a much greater incidence of unrepresented litigants. There may, or may not, be overall savings to a provincial budget.

One can try for the most efficient delivery system possible (and the review will be suggesting some areas for further investigation in Manitoba) but there is only so far one can go in streamlining delivery costs. There is another area that might prove fruitful to investigate and that is the operation of the justice system. The reviewer heard repeatedly from legal aid staff and administrators and found in the various reviews of legal aid the point that legal aid does not operate in isolation. Some say that legal aid is "at the end of the line". In criminal law this means that government policy, prosecution decisions and police actions will influence the demand for legal aid. It is argued that legal aid should have a greater voice when new policies are being considered so that the full cost will be known.

The 1996 Nova Scotia review on the issues of integration and independence put it this way:

> By making separate policy and funding decisions for components of the justice system, government is establishing the size and shape of the pieces without a clear sense of how they will fit or what the whole should look like. The review has received may representations from individuals and groups directly involved in family and criminal matters who see an urgent need for a thorough review of the justice system as a whole. They argued persuasively for reforms which would see fewer people brought before the courts and greater use made of mediation and diversion. [120]

The resulting recommendation was for a more integrated approach to setting policy and priorities. Along the same lines the Nova Scotia Review argued for better communication. They said:

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[120] Nova Scotia Report, *supra* note 30 at 30.

> Through our work we were continually struck by two things: the close interconnection of each component of the justice system, including legal aid, and the almost total lack of communication among the components on broad issues of policy management. The lack of communication is both caused by and is the result of the need for independence-the judiciary, crown attorneys, private bar and legal aid, and court administrators must be independent of each other to function effectively in the interests of justice. Because the components are independent, they are co-participants who can have no manager.[121]

And further:

> The goals-independence and efficiency-are not mutually exclusive. Indeed, not only is it possible to promote greater efficiency without compromising independence, it is highly desirable. Cooperation is in the interests of justice since it promotes understanding and allows each component of the system to make the kinds of adjustments needed to make better use of resources and deliver improved service.[122]

Alan Young, in his paper for the Ontario Legal Aid review, makes a number of suggestions for changes to the administration of justice that could result in reduced legal aid costs.[123] The review recommends a review of the suggestions and further recommends the pursuit of a more integrated systematic approach to administration of justice decision making.

10. Conclusions

Before outlining the conclusions, the review notes issues that, while outside of the mandate, might warrant further investigation with a view to improving the operating efficiency of the plan, and possibly providing funds for reallocation to direct service delivery. Again, as an operational review was outside of the scope of this review, and in light of the deadline to report, the review did not go into depth in these areas.

The areas for consideration are outlined below.

Expanded Duty Counsel – The program should be examined to ensure that it is still meeting its original goals. While criminal charges in Manitoba have been relatively stable since the program's inception, certificates and certificate equivalents have not decreased over time as may have been expected. The reviewer understands that the premise of the program was to take cases out of the system early, before they got to the certificate or certificate equivalent stage.

Speciality Offices – Are the Winnipeg-based Aboriginal Law Office and Public Interest Law Centre meeting their initial mandates? Are their mandates still appropriate?

Reliability of Information – On occasion, the reviewer found financial and statistical information was difficult to come by, hard to interpret, and not always consistent.

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[121] *Ibid* at 33.
[122] *Ibid* at 33.
[123] Young, *supra* note 79 at 672.

Operational Review - To address the concerns that surfaced in this report and to improve the operating efficiency of the plan, Legal Aid Manitoba should consider conducting a detailed operational review of the plan in its entirety.

The conclusions of the review will now be presented.

Throughout this report, the review suggested actions that should be taken. The review now brings those suggestions together in the form of conclusions. The Terms of Reference requested advice on the following issues:

1. What is the best way to move towards greater reliance on staff lawyers?

2. What would the service delivery model look like?

3. In what manner would legal services be delivered?

4. What legislative, policy and organizational changes would be required to achieve this objective?

The review was also asked to pursue the goal of cost neutrality.

The review's conclusions are:

- Some cost savings could be achieved through greater use of staff; however the savings will occur over time. While no extra expenditures are required after the first year, it will take an extra two years to recover the transition and start up costs.

- These savings would occur in the criminal law area, but not in the family law area.

- The review would not recommend additional staff in the family law area due to cost and the need to deal with conflicts.

- The family tariff may need to be reviewed to keep the private bar in the system.

- Staff practices in the family law area should be reviewed to ensure the most effective use of resources. There is a significant differential in cost between the private bar and staff. While many possible explanations were put forward, the review was unable to verify them due to time constraints.

- In the criminal law area, the review suggests the addition of ten staff lawyers in a separate and specialized certificate office to handle certificates and conflicts for all types of cases including large cases, recognizing that a ten lawyer office will only be able to assume responsibility for a limited number of large cases.

- Before proceeding to add staff, it is imperative that there is some confidence that the minimum target of 280 criminal cases per year can be met.

- In order to ensure an adequate case stream for the new office, choice of counsel will need to be removed from *The Legal Aid Services Society of Manitoba Act* as there is some debate over the extent to which the current provision allows this.

- Legal Aid Manitoba staff need to be prepared to take on larger cases to provide some alternative to the private bar.

- Complex litigation or mega-trials should be budgeted outside of the normal budget process. This is the case in the jurisdictions the reviewer talked to. No province could handle a mega-trial in their normal budget. This does not mean Legal Aid Manitoba staff should not be acting in these trials, but it must be recognized that extra funding will be required.

- The tariff for Category A offences should be redesigned in order to be more inclusive of the "large" cases and to reduce the reliance on enhancements.

- Enhancements should be determined and approved by a committee as opposed to an individual.

- Consideration should be given to appointing a half to full time chair for the next one to two years.

- Administration costs should be carefully reviewed. On a comparative basis these costs represent a higher proportion of expenditure than many other plans.

- In order to deal with the issue of conflicts, *The Legal Aid Services Society of Manitoba Act* should be amended. While a legislative amendment will not be sufficient and structural changes such as the separate office will be required, legislation such as that in Newfoundland and Labrador would be helpful. The Newfoundland and Labrador *Legal Aid Act* states:

  > "Notwithstanding the Law Society Act, a solicitor employed by the commission does not commit a breach of a rule or code of legal ethics of the Law Society of Newfoundland relating to conflict of interest, by reason only of advising or representing a person in a dispute or case where another person involved in that dispute or case is being advised or represented by another solicitor employed by the commission." (ss. 31(8)).

- *The Legal Aid Services Society of Manitoba Act* should be amended so that the entire Board does not have to deal with administrative appeals. Currently, appeals of denial of legal aid and fee disputes end up at the Legal Aid Manitoba Board of Directors. This occupies a great deal of the Board's time and takes the Board away from its main duties of setting direction and monitoring performance. Appeals should go to a committee of the Board. This will also require adequate compensation for the committee hearing the appeals.

Appendix A – Terms of Reference

Terms of Reference

I request that you undertake research and provide me with advice and recommendations on the future delivery of legal services to indigent persons in Manitoba. In particular, I seek your advice on the following issues:

a) What is the best way to move towards greater reliance on staff lawyers?

b) What would the service delivery model look like?

c) In what manner would legal services be delivered?

d) What legislative, policy and organizational changes would be required to achieve this objective?

In the discharge of this mandate you are authorized to consult with the Manitoba Bar Association, the Criminal Trial Lawyers' Association, the Legal Aid Services Society, the Law Society and any other organization or individuals you feel may assist in the development of your advice and recommendations.

I would like you to provide the Deputy Attorney General with regular updates as this matter progresses, and a final summary report to me by or before March 15, 2004.

Dated at Winnipeg, Manitoba this 28th day of November 2003.

Gord Mackintosh
Minister of Justice
Attorney General

Appendix B – Parties Consulted by the Review

Legal Aid Manitoba

Gerry McNeilly
Executive Director

Gord McKinnon
Former Chair

Robin Dwarka
Director
Administration

Jan Perchal
Acting Director
Administration

Patricia Simpson
Office Manager
Family Law Office

Darlene Vlaming
Office Manager
Winnipeg Criminal Law
Office

Charles Birks
Staff Attorney

Bill Armstrong
Acting/Chairperson
Legal Aid Manitoba Board
of Directors

Mike Walker
Supervising Attorney
Criminal Law Office

Dave Joycey
Supervising Attorney
Child Protection Unit

Bill Dunn
Legal Director

Gil Clifford
Deputy Director

Bill Malcolm
Director of Policy &
Planning

Lori Ferguson Sain
Legal Aid Manitoba Board
of Directors

Cathy Sherman
Supervising Attorney
Family Law Office

James Ramsay
Director of Management
Information Systems

Al Libman
Staff Attorney

Lorne Giesbrecht
Area Director/Supervisory
Attorney
Westman Community Law
Centre - Brandon

Leonard Tailleur
Supervising Attorney
Northlands Community
Law Centre -The Pas

Theresa McDonald
Supervising Attorney/Area
Director
Community Law Centre -
Thompson

Gordon Bates
President
Legal Aid Lawyers
Association

Other Legal Aid Plans

Newman Petten
Chief Executive Officer
Legal Aid Newfoundland
and Labrador

Gerrard Lukeman
Executive Director
Legal Aid Nova Scotia

Yves Carriere
Legal Aid Quebec

Rona Fleming
Legal Aid Policy Unit
Government of Ontario

George Biggar
Vice President
Policy, Planning &
External Relations
Legal Aid Ontario

Mark Benton
Executive Director
British Columbia Legal
Services Society

Robert Gibbings, Q.C.
Chair
Legal Aid Saskatchewan

Jane Lancaster, Q.C.
Chief Executive Officer
Saskatchewan Legal Aid
Commission

Laura LaCoursiere
Executive Director of
Administration
Saskatchewan Legal Aid
Commission

Jerome Boyko
Director of Financial Management
Saskatchewan Legal Aid Commission

Manitoba Justice

Bruce MacFarlane, Q.C.
Deputy Minister of Justice & Deputy Attorney General

Patrick J. Sinnott
Executive Director
Administration & Finance Division

Joan MacPhail
Director
Family Law Branch

Tracy Morrow
Lawyer
Family Law Branch

David Greening
Policy Analyst
Policy Development & Analysis Division

Judiciary

The Hon. Raymond Wyant
Chief Judge
Provincial Court Manitoba

Private Bar

Mike Williams
Family Law Lawyer

John Ramsay
Family Law Lawyer

Sheldon Pinx
The Criminal Trial Lawyers Association

Saul Simmonds
The Criminal Trial Lawyers Association

Richard Buchwald
President
The Manitoba Bar Association

Veronica Jackson
The Manitoba Bar Association

Other

Allan Fineblit, Q.C.
Chief Executive Officer
Law Society of Manitoba
(Former Executive Director of Legal Aid Manitoba)

Albert W. Currie
Principal Researcher
Access to Justice, Research and Statistics Division
Justice Canada

John Stuart
State Public Defender
Minnesota State Board of Public Defense

Ron Klassen
Crown Counsel
Family Law Branch
Manitoba Justice
(Former Acting Executive Director of Legal Aid Manitoba)

Appendix C - The Minnesota State Board of Public Defense[124]

This appendix provides an overview of the Minnesota State Board of Public Defense and particularly coverage, eligibility, delivery, caseloads and conflicts. Before discussing the Minnesota program, however, context is provided by way of an introduction to what is known as the "indigent defense" system in the United States.

Coverage

The sixth amendment to the United States Constitution establishes the right to counsel in federal criminal prosecutions. Through a series of cases, the U.S. Supreme Court has extended the right to counsel for indigent defendants to state criminal prosecutions. That right to counsel extends to all felonies and misdemeanors that carry a sentence of imprisonment.[125]

Generally, a felony is a crime punishable by one year and a day or more in a state prison. A gross misdemeanor is punishable by up to one year and a misdemeanor by up to 90 days in a county jail.

Eligibility

The court decides eligibility. Generally, if a person is on food stamps or welfare he or she is eligible. Eligibility is indexed to the federal poverty line.

Delivery

There are three main indigent defense delivery models in the United States.

- State-wide public defender programs are ones in which an individual appointed by the governor, a commission, council or board is charged with developing and maintaining a system of representation for each county of the state. These systems use full-time or part-time salaried staff.
- Assigned counsel systems involve appointment by the courts or private attorneys as needed from a list of available attorneys.
- Contract attorney systems involve governmental units that reach agreements with private attorneys, bar associations, or private law firms to provide indigent services for a specified dollar amount and for a specified time period.[126]

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[124] This appendix is largely based on an interview with John Stuart, Minnesota State Public Defender.

[125] U.S. Department of Justice, Office of Justice Programs. Bureau of Justice Statistics, Selected Findings, Indigent Defense, Feb. 1996 at 2.

[126] *Ibid* at 1- 2..

Minnesota

Minnesota has a state-wide public defender system. It has ten judicial districts, 400 full-time equivalent employees and handles 175,000 criminal cases per year. (Civil cases are handled by a separate organization.) The budget is $53 million per year. Based on a population of five million, the per capita costs for criminal legal services are approximately $10.60 U.S. per year. At an exchange rate of 1.32, this translates into a Canadian equivalent is $14.03. Manitoba's cost per capita for criminal legal aid, including a relevant proportion of central administration costs, is $9.08.[127]

Caseloads

The American Bar Association has suggested an annual caseload of 150 felonies or 400 misdemeanors per lawyer. To determine equivalent mixed caseloads, Minnesota assigns felonies a value of 2.67 case units and misdemeanors a value of one case unit. Thus a lawyer handling 400 misdemeanors would have a caseload of 400 units and a lawyer handling 150 felonies would have a caseload of 400 units (2.67 multiplied by150). While the Minnesota State Board of Public Defense aims to have its lawyers have a caseload of 600 units, currently the caseloads are running at 800 units.

Conflicts

Conflicts are handled in one of two ways in the Minnesota public defender system. Each judicial district is considered a separate entity. Thus public defenders from one judicial district may appear in another judicial district and will be considered as part of a separate law firm.

The other method is the use of part-time public defenders. Part-time public defenders are often former public defenders that have decided to establish their own law firm. They will carry a certain percentage of their practice as public defenders and will receive a proportionate salary. They will also receive assistance with office overhead. The fact that really seems to make the part-time system work is that those lawyers carrying on at least a half time public defender practice are eligible for state medical insurance and pension.

There are ten part-time public defenders in Minneapolis and ten in St. Paul. This gives the system the ability to handle cases with multiple accused.

There is also an emergency fund that can be accessed in exceptional cases to hire private counsel.

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[127] See Appendix G, Chart G1.

Appendix D – Legal Aid Coverage

What Cases are Eligible? How has Coverage Changed over Time?

Determining the parameters for legal aid coverage in Manitoba requires reference both to the *Legal Aid Regulation*, passed pursuant to *The Legal Aid Services Society of Manitoba Act*, and to policy decisions made by the Legal Aid Manitoba's Board of Directors. As will be described in greater detail below, the relevant sections of the *Legal Aid Regulation* **require** legal aid to be provided in certain serious criminal proceedings (described below as "mandatory coverage"). They also **permit** Legal Aid Manitoba to fund a variety of civil and less serious criminal or penal matters (described below as "permitted coverage"). These provisions have remained largely unchanged since the first *Legal Aid Regulation* was passed in 1972.[128] Some significant changes in coverage **have**, however, occurred over time, in the form of board-directed policies stating which among the broad range of "permitted" matters will **no longer** be eligible for coverage. In other words, Legal Aid Manitoba's policies concerning the permitted categories have historically started from the premise of full coverage. As a result, the short history of legal aid coverage that follows will set out the regulatory parameters for various categories of cases followed by information provided by Legal Aid Manitoba staff[129] regarding the restrictions, if any, that the board has imposed over time.

Mandatory Coverage: Criminal Matters

Section 10 of the *Legal Aid Regulation* currently states that Legal Aid Manitoba **must** fund the following criminal matters:

- anyone who is charged with an indictable offence
- anyone who is charged under the *Extradition Act* (Canada) or the *Fugitive Offenders Act* (Canada) (the latter act governing an extradition process for Commonwealth countries)
- anyone for whom the Crown has applied for preventive (indefinite) detention under the dangerous offender provision of the *Criminal Code* (Canada)
- anyone who faces an appeal by the Crown in any of the above matters

The only difference between this element of the *Legal Aid Regulation* and that of the 1972 *Regulation* is that funding for Crown appeals in these matters has been made explicitly mandatory. However, in practice, coverage has remained virtually unchanged for these criminal matters since Legal Aid Manitoba's inception.

Permitted Coverage: Criminal Matters

By contrast, subsection 11(2) of the *Legal Aid Regulation* states that Legal Aid Manitoba **may** fund less serious criminal or penal matters, namely a summary conviction proceeding whether under federal or any province's legislation or an infraction of a Manitoba municipal by-law. To be eligible under this category, upon a conviction or final order there must be "a likelihood of imprisonment", a likelihood of losing the "means of earning a livelihood", or "special circumstances…that warrant furnishing legal aid". A Legal Aid Manitoba area director determines whether to provide legal aid under this category. The area director's decision may be appealed to the executive director[130] and then the board.[131] However, there are few appeals on this issue.[132]

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[128] M.R. 106/72, filed July 24, 1972 [hereinafter "1972 Regulation"].

[129] Telephone interview with Legal Aid Manitoba Legal Director, Bill Dunn, January 21 and February 2, 2004 [hereinafter Dunn].

The only significant difference between today's regulation and the 1972 regulation for this coverage category is the addition of the ground citing "special circumstances" and the deletion of the ground of "the infliction of appreciable financial loss or deprivation upon the applicant, or any dependent of the applicant"[133]. However, this is not significant change as the vast majority of applicants in this category base their claim on the risk of imprisonment. Legal Aid Manitoba has not otherwise restricted coverage for this type of criminal or penal proceeding.

Permitted Coverage: Youth Criminal Matters

Under paragraph 11(1)(a) of the *Legal Aid Regulation*, Legal Aid Manitoba **may** fund any proceeding under the *Young Offenders Act* (YOA) (Canada) (now the *Youth Criminal Justice Act* (YCJA)), which is the federal legislation that governs how youth aged 12 to 17 are prosecuted for criminal offences. The above criteria for summary conviction offences and municipal bylaws do **not** apply. The 1972 *Regulation* originally permitted coverage for "any proceeding in a Juvenile or Family Court".[134] The reviewer was advised that Legal Aid Manitoba has provided full coverage for youth criminal cases since its inception.

It is important to note, however, that when the YOA came into force in 1984, s. 11 (now s. 25 of the YCJA) established the right of a young person, if he or she so desires, to a state funded lawyer in any proceeding under the legislation, even if ineligible for legal aid from a financial standpoint. In Manitoba, Legal Aid Manitoba has continuously fulfilled the provincial government's responsibility for providing coverage for such cases.

Permitted Coverage: Civil Matters

The *Legal Aid Regulation* further **permits** funding for a wide range of non-criminal matters (e.g. family law issues, civil actions, administrative/poverty law disputes, and immigration matters) provided they fall within the following categories[135]:

- any civil proceeding (including those before an administrative board or commission)
- bankruptcy proceedings once a receiving order or authorized assignment is in place
- preparation of documents or negotiation of a settlement where the subject matter would normally fall within the professional duties of a private lawyer
- proceedings called certiorari, mandamus, prohibition or habeas corpus (which are special remedies that superior courts can order)
- any matter within the province concerning someone who does not reside here

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[130] Legal Aid Regulation *supra* note 34, s. 50

[131] *Ibid.*, s. 51

[132] Dunn, *supra* note 129.

[133] 1972 Regulation supra note 128 at para. 19(2)(a)(i).

[134] *Ibid.* at para. 19(2)(c)(i).

[135] Ss. 11(1)

It also allows, but does not require, funding for certain appeals, such as from a municipal assessment of property. Other court appeals in any of the matters eligible for legal aid funding may additionally be funded provided that the executive director believes the appeal has merit or the court has requested appointment of counsel.[136]

Again, except for the removal of a couple of very minor exceptions to coverage for civil proceedings (e.g. ""breach of promise of marriage", "criminal conversation", and certain "proceedings for the recovery of a penalty"[137]) the regulatory provisions setting out the permitted areas of coverage for non-criminal matters have remained virtually the same.

Consultation with Legal Aid Manitoba staff indicates that coverage for those permissive categories was broad and generous until the 1980's. However, since then, Legal Aid Manitoba has steadily narrowed the scope of coverage in these areas over time, due largely to budgetary pressures. These developments are set out below.

Civil Actions

In the early 1980's Legal Aid Manitoba funded financially eligible parties in many civil lawsuits. Common examples included wrongful dismissal actions and defences, defences against proceedings brought by banks, and consumer protection related matters. The merit of the case (its likelihood of success) was a funding consideration only for the person who started the legal action, not for the person defending one. Over time restrictions on the civil suits that were eligible were applied, starting in the late 1980's with a new requirement that the lawyer obtain a separate approval for funding to take the case to court if it could not be settled beforehand. This is now a standard requirement for all non-criminal cases. Later restrictions excluded cases from coverage where there was a claim for a lump sum of monetary damages or that were so small that an individual without access to legal aid would not find it worth paying to go to court. The Legal Aid Manitoba's board later directed that it would no longer fund civil law suits unless the claim is meritorious and advances a strong public interest or is a claim to disability benefits from a private insurance company. The reviewer was advised that Legal Aid Manitoba currently funds very few or no civil actions.[138]

Administrative/Poverty Law

A similar trend has affected cases in the area of administrative/poverty law (i.e. involving a claim to a government provided benefit such as worker's compensation, disability or pension benefits or a challenge to the government's regulation of one's activities). Governmental regimes set up to administer benefits or regulations often involve a number of procedural steps and appeals before reaching the courts and are supposed to be designed as an alternative to the courts that can be accessed by everyday people. As with civil actions, until the early 1980's, coverage was provided for a broad range of cases in this area starting from the earliest steps in the process. Over time, only certain administrative proceedings were funded, most involving benefits that provide income security of some kind, and only at a later step in the procedure. That being said, the area directors retain discretion to approve funding in cases where significant interests are at stake.[139]

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[136] ss. 11(3)

[137] 1972 Regulation, *supra* note 128, s. 20.

[138] For the most recent outline of restrictions on coverage, please refer to Legal Aid Manitoba's May 12, 2003 "Notice to the Profession".

Family Matters

Family matters (e.g. child protection, adoptions, child access, custody and guardianship, separation and divorce) enjoyed very full coverage until approximately two years ago at which point a significant change was introduced. At that time, "bare" divorces became ineligible, that is, divorces that did not involve incidental orders under the *Divorce Act* relating to child or spousal support or to child custody and access. As these incidental matters may also be resolved under provincial law while a couple is separated, the individuals involved may receive legal aid for all of the steps under provincial law short of a divorce, and then find that there is no funding for the divorce itself as a separate proceeding under federal law. Adoptions and guardianship determinations also became ineligible, unless they were contested. Cases that strictly involve marital property division upon marriage breakdown further were denied coverage, unless there was a claim for pension division by an ex-spouse who would actually receive payments under the pension in the near future. Finally, funding for *amicus curiae* (lawyers appointed by the court to argue for a child's best interests in a child custody or child welfare proceeding) is now available only to those cases involving a child over 12 who is able to instruct counsel (obtain his or her own advice from a lawyer), as provided for in ss. 34(2) of *The Child and Family Services Act.*[140]

Immigration

Legal Aid Manitoba's internal policy governing coverage for immigration matters has not changed significantly over time. Legal Aid Manitoba will fund meritorious cases involving a serious immigration issue with a sufficiently significant impact on the applicant. By way of example, an individual who wishes to sponsor a relative to immigrate to Canada will not be eligible, while a meritorious refugee claim or challenge by someone who is being detained in custody will receive assistance.

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[139] For the most recent outline of restrictions on coverage, please refer to Legal Aid Manitoba's May 12, 2003 "Notice to the Profession".

[140] C.C.S.M. c. C80; For the most recent outline of restrictions on coverage, please refer to Legal Aid Manitoba's May 12, 2003 "Notice to the Profession".

Appendix E – Financial Eligibility Across Canada

Updated from Table 3 in: S. Tsoulakas, & P. Roberts. *Legal Aid Eligibility and Coverage in Canada – unpublished.* (Ottawa: Canadian Centre for Social Development, 2002).

Province	Income definition		Family definition	Asset Test		Maximum income levels $ (full and automatic eligibility)			Client Contributions		Expanded Eligibility		Administration fee
(criteria last updated)	Net or gross	Deductions		Y/N	Personal exemption	1 person	2 people	3 people	Y/N	Circumstances	Y/N	max $ amount payable	$
British Columbia (2000)	Net income	Child tax benefit, family bonus, tuition and book fees, day care expenses, child support payments and alimony payments, court fines, medications, interpreter if need for court case	Family size	Y	$2000 for individual up to $8000 for 6 person family. $5000 equity in a car, $10,000 total share of disposable income.	11,100 (criminal) 12,024 (all other)	16,858 (criminal) 18,048 (all other)	19,440 (criminal) 21,060 (all other)	Y	All must pay some form of contribution. There is a sliding scale depending on income. It is up To a maximum of $100	N		None
Alberta (2001)	Gross income		Family size	N	No set guidelines. But, if they can liquidate assets, they will be asked to do so	13,800	16,800	22,800	Y	Assessed on a case-by case basis. Alberta legal aid is not free for anyone.	Y	They have an income range that is meant for applicants who will pay	None
Contribution						21,500	27,800	29,400					
Saskatchewan (1989)	Net income	Child tax benefit, Sask Child benefit and Sask employment supplement	Family size (Their use of "family" can mean either a single or two-person family)	Y	<$1,500 for 1 person to a max of $3,500 for families with 1 to 8 children	9420 (Unofficially limits are interpreted liberally in Sask.)	11,400 to 12,300	15,000	Y	If above social assistance, they may be asked to contribute.	N		None
Contribution						11,830	13,800 to 14,700	17,400					
Manitoba (2000)	Gross income	Child tax benefit	Family size	Y	All assets are assessed. Overall Not more $5,000 in liquid assets	14,000	18,000	23,000	Y	Assessed on a case by case basis. Depends on assets and ability to pay	Y	Partial contributions are negotiated. Expanded eligibility requires full contribution	$25
Partial contribution						16,000	20,000	25,000					
Full contribution						23,000	27,000	31,000					
Ontario (1996)	Net income	CPP, EI, day care costs, support paid, Child tax benefit	Family size	Y	Single person $1,000 to $2,000 for 3 people	7,212	12,900	13,144	Y	Case by case basis depending on disposable income.	Y		None
Maximum amt						13,064	21,820	25,440					

Province	Income definition		Family definition	Asset Test		Maximum income levels $ (full and automatic eligibility)			Client Contributions		Expanded Eligibility		Administration fee
(income test updated)	Net or gross	Deductions		Y/N	Personal exemption	1 person	2 people	3 people	Y/N	Circumstances	Y/N	max $ amount payable	$
Quebec (1996)	Gross income	Child tax benefit, children's special allowances, family assistance, GST/PST tax credit, tax credit for care of elderly, Parental wage assistance benefits, social housing benefits	Family type. Considers the number of children as 2+	Y	Two scales. Property: Applicant/spouse owner of residence $90,000; not owner of residence $47,500. Liquid assets: single person $2,500 and family $5,000	8,870	12,500	15,000	N	Not if below the first set of guidelines.	Y	Fixed amounts between $100 and $800.	$50 is charged to those who are eligible under a contribution. It is deducted from the amount owing in the end.
Contribution						12,640	17,813	21,375					
NB	Gross income	Child tax benefit	Family size						Y	Case by case basis depending on whether the applicant has enough disposable income. They are "worked out" arrangements	N		None
Nova Scotia (1996)	Gross income	Child tax benefit	Family type	Y	Case by case basis. Income is the primary factor in eligibility	12,804	16,332 to 17,088	20,400 to 25,498	Y	The Commission can, if they feel that the applicant can contribute some amount.	N	Cannot bridge the gap unless the provincial government is willing to cover the costs.	None
PEI (2003)	Gross income		Family size	N	Can be asked to liquidate if needed.	14,885	19,926	23,179	Maybe	Case by case basis	N		None
Newfoundland & Labrador (1997)	Net income	CPP, EI and group insurance and pension. "Take home pay"	Family type and size	Y	Case by case basis.	4,716	5,808 to 6,410	6,324 to 8,360	Y	When the area director determines the applicant can pay some part, they can enter into an agreement.	N		None

Appendix E – Financial Eligibility Across Canada

A brief summary of legal aid financial eligibility guidelines for all Canadian provinces is provided in this appendix. This content is based primarily on the extensive research conducted by Spyridoula Tsoukalas and Paul Roberts of the Canadian Centre for Social Development.[141]

All jurisdictions except New Brunswick have some type of official guidelines or cut-offs indicating income beyond which applicants are not normally entitled to legal aid. Some of these guidelines are set by the provincial government, some by the legal aid plan, and some by both of them jointly. The guidelines vary by family size and some may vary by community size. Some jurisdictions use Statistics Canada's Low Income Cut-offs (LICO) as their starting point for determining appropriate income levels, while others use social assistance payment levels. Assets, liabilities and expenses are also taken into consideration. And to further complicate the system, each jurisdiction differs in how strictly they adhere to any of their own regulations. In many instances, one is told that "it depends" whether an applicant who is slightly above the guidelines or cut-offs will be issued a certificate, or not. One area where all the plans are in agreement, however, is that people on social assistance can qualify for legal aid.

According to Tsoukalas and Roberts, comparisons among the jurisdictions are somewhat difficult, given the amount of discretion and the complexity of some of the plans.

This appendix provides some basic comparisons among the jurisdictions to illustrate their similarities and differences.

Income Definitions

One major area of difference among the legal aid plans is the way in which each plan defines income. Four of the ten provinces use net income, while the others use gross income. (Net or after-tax income is a person's gross income minus income taxes; gross income is income from all sources, including government transfers.) Why use one instead of the other? One reason may be that Canada's tax system is progressive. Net income can be higher than gross income since individual tax credits and social assistance are not taxable. Some families in low-income before taxes can be relatively better off – and not in a low-income situation – on an after-tax basis. One might expect that jurisdictions using net income would have lower guidelines overall, and it appears that this is generally the case.

British Columbia, Saskatchewan, Ontario and Newfoundland and Labrador all use net income, and their guidelines for standard eligibility range from $4,716 for a single person in Newfoundland and Labrador, to a high of $11,100 for criminal matters and $12,024 for civil matters in British Columbia. Among the provinces using gross income as the criteria, the lowest income guidelines are in Quebec, where an individual (or a one-person family) is capped at $8,870 for gross income, to a high of $14,885 in Prince Edward Island.

Each legal aid plan allows the applicant to make different deductions from the calculation of their income. The most prevalent is the Child Tax Benefit, with six of the ten provinces allowing this deduction. Other jurisdictions include tax credits, childcare costs, the costs of medications, school or book fees, and child support payments. Quebec allows the greatest number of deductions – including the Child Tax Benefit, tax credits for the care of the elderly, and social housing benefits. Allowing these deductions creates some flexibility in the income guidelines and may enable some families to meet the guidelines, despite any benefits they may have received from other social programs.

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[141] Tsoukalas & Roberts, *supra* note 54.

Each province's eligibility criteria also take into account other factors beyond just income. Family size, assets, liabilities and expenses can also be considered.

Most jurisdictions define family in the same way, using family size as the main criteria. A family can include a spouse (through marriage and common-law relationships) and dependants, who may be children or other individuals who rely on the applicant. In most jurisdictions, family size does not distinguish between one- or two-adult households with dependants. This implies that single-parent families are allocated the same income limits as couples. Nova Scotia, Newfoundland and Labrador and Quebec base their guidelines on family type and family size. However, Quebec consolidates the number of children at two, meaning that their income limit for a two-parent family with two children would be equivalent to a two-parent family with four children.

All jurisdictions have some form of an asset test. An asset test can be used to deny eligibility to those above a certain income limit or to identify those who may be able to contribute some amount towards their legal costs. Some plans have clearly articulated cut-offs for assets, while others have tests that are discretionary. For example, in Nova Scotia, for the most part, eligibility is based on income, but if something appears to be irregular, they will investigate an applicant's assets before making any decisions. Provinces such as Quebec have very clear definitions that identify by how much an applicant can exceed the asset limits, if at all. In all jurisdictions, an applicant can have some liquid assets, with ranges from $1,500 for an individual in Saskatchewan, to a $5,000 maximum in Manitoba (depending on family size and the nature of the case). Applicants with assets above these exemptions are denied legal aid coverage because they are felt to have enough money to cover a lawyer's fees.

The plans also examine other types of assets, such as a house, property or a vehicle.[142] All jurisdictions allow applicants to keep their family home and their car, provided these are not extravagant luxuries. But in some jurisdictions – such as Manitoba, Alberta or New Brunswick – applicants may be asked to take a lien out on their property. And once again, some jurisdictions clearly articulate the total amount they are assessing, while others do not. Jurisdictions also differ in what they consider to be a "modest" amount of assets that can be held.

Differences among jurisdictions also exist in the way legal aid guidelines are viewed. For example, in Prince Edward Island, Newfoundland and Labrador and Ontario, the guidelines are considered to be a starting point for discussions; they are not used to refuse an applicant outright. Expenses and liabilities are heavily weighed into an assessment. For example, Newfoundland and Labrador examines whether an applicant can meet his or her "basic needs" with the income they have. Ontario follows a similar principle. The systems in Prince Edward Island and

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[142] There is an understanding that vehicles may be important to the livelihood of the applicant and his/her family.

Newfoundland and Labrador are discretionary, while Ontario's is clearly laid out. Legal Aid Ontario considers a basic allowance, a shelter allowance, boarder allowance and debt allowance, then an applicant's financial situation is assessed against these allowances. When combined, they can raise the eligibility limit for a single-person family from $7,212 under the income waiver, to $13,068 with the maximum allowance. Other jurisdictions such as Alberta and Manitoba indicate that they are also flexible in applying their guidelines, particularly when an applicant only slightly exceeds the guidelines or the asset tests.

Expanded Eligibility through Contributions

Jurisdictions can establish systems that allow applicants to have incomes above their standard guidelines if they agree to contribute towards the costs of the legal aid services provided. The plans may expect partial or full repayment of the legal costs. Alberta, Manitoba, Quebec and Ontario all have programs that allow applicants expanded eligibility through their own contributions.[143]

Alberta, Manitoba and Quebec have set up a contributory system. That is, if the applicants fall within the necessary second or third set of guidelines and are willing to pay some pre-set amount, they may be eligible for legal aid. Ontario has established a system whereby an applicant who exceeds the income waivers can still be eligible, if they do not exceed a series of allowances for shelter, basic needs and debts.

In Alberta, for example, once an applicant exceeds the relevant cut-off, they become eligible through partial contributions. In this way, the income limits for a single-person family in Alberta are extended from $13,900, to a maximum limit of $21,500. The amount of repayment depends on the type and complexity of the case. Quebec's eligibility through contribution program requires an in-depth assessment of family size, income and assets. The limit for a single-person family is $12,640 under the expanded eligibility criteria, compared to a limit of $8,870 for non-contributory legal aid services. The amount that would need to be repaid ranges from $100 to $800.

Manitoba has both partial and full contribution levels. This system was created specifically to help low-income families that are "near poor" or "working poor."[144] The full amount for repayment is meant to be lower than the costs would be to hire private counsel, because the tariffs for the legal aid lawyers are lower than those in the private sector.

After examining the various expanded eligibility programs, the National Council on Welfare in their report *Legal Aid and the Poor*[145] provided that the only successful attempt to give low-income earners access to legal services in a non-discretionary, clear and open manner was Manitoba's expanded eligibility program.

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[143] It has been suggested that Saskatchewan also has an expanded eligibility program. The Executive Director of Administration in Saskatchewan did, however, provide that less than 1 per cent of approved applications are assessed a contribution (Email correspondence from Laura LaCoursiere, Executive Director of Administration, Saskatchewan Legal Aid Commission, February 13, 2004).

[144] Low-income wage earners are often called the "working poor".

[145] National Council on Welfare (1995). Legal Aid and the Poor. (Accessed on the internet at http://www.ncwcnbes.net/htmdocument/reportlegalaid/reportlegalaid.htmon February 19, 2004.)

Fees and Client Contributions

There are two types of fees used by the plans: administrative fees and client contributions. Administrative fees are not widely used. Manitoba and Quebec have the only plans that require an application fee. Manitoba charges a $25 application fee[146] and Quebec requires a $50 refundable application fee for their contributory plan. Alberta has recently eliminated their application fee.

On the other hand, client contributions are widely used by many jurisdictions. Most are quite flexible, meaning that it "depends" on the applicant's ability to pay – which is often determined by the area director, depending on the jurisdiction. Applicants for legal aid normally do not have to pay at the outset in order to receive the service. Instead, they can enter into written agreements. British Columbia is the only jurisdiction that requires payment *before* a certificate is issued. The Legal Services Society of British Columbia uses a sliding scale based on an applicant's income, with a maximum amount of $100 that can be collected.

How Do the Financial Eligibility Guidelines Compare to the Low Income Cut-offs?

The Canadian Council on Social Development authors compared each province's eligibility guidelines with Statistics Canada's Low Income Cut-offs (LICO). LICOs were selected as the main dividing line for determining whether a family is low-income because it is viewed by many social researchers as a poverty line. Public polling conducted in Canada has given credence to the use of LICOs. Both Gallup and EKOS have conducted polls that provide a guide to what the general public considers to be poverty. One finds that there is an extremely close correspondence between public opinion and the LICOs, with both rising over time in line with average income, or the standard of living.[147]

This analysis found that, overall, the legal aid guidelines in all jurisdictions tend to be below the corresponding LICO levels, and the largest differences were observed in large urban areas. What this means is that a very significant number of families living below the poverty line across Canada are not eligible for legal aid; moreover, poor families in larger urban centres are much less likely to qualify when compared to poor families living in rural areas.

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[146] The fee can be waived for particular groups.

[147] For a more detailed discussion of LICOs, poverty measures and the results from Gallup and EKOS public opinion polls, please refer to Ross et al. *The Canadian Fact Book on Poverty 2000*. Canadian Centre for Social Development: Ottawa, 2000. It should be noted, however, that Statistics Canada does not consider the LICOs to be poverty lines. The following is an official statement by Statistics Canada on the use of LICOs – *For many years, Statistics Canada has published a set of measures called the low income cut-offs. We regularly and consistently emphasize that these are quite different from measures of poverty. They reflect a well-defined methodology which identifies those who are substantially worse off than the average. Of course, being significantly worse off than the average does not necessarily mean that one is poor. Nevertheless, in the absence of an accepted definition of poverty, these statistics have been used by many analysts to study the characteristics of the relatively worst off families in Canada. In the absence of politically-sanctioned social consensus on who should be regarded as "poor", some people and groups have been using the Statistics Canada low-income lines as a de facto definition of poverty. But they certainly do not represent Statistics Canada's views about how poverty should be defined.* (Excerpted from Fellegi, Ivan P. *On Poverty And Low Income*. Statistics Canada, Ottawa. Cat. no. 13F0027 XIE).

Specifically speaking, the proportion of poor families who are fully eligible ranges from a low of 18 per cent in Newfoundland and Labrador to a high of 87 per cent in Nova Scotia. As is the case for families, the proportion of poor young adults (18 to 35 years) who are fully eligible for legal aid ranges from a low of 20.7 per cent in Newfoundland and Labrador to a high of 88.1 per cent in Nova Scotia.

It is important to note that the data analyses were conducted using Statistics Canada's *Income In Canada 1999* and the *Survey of Labour and Income Dynamics* (SLID) *1998* in order to compare the financial eligibility guidelines to the LICOs, and to determine the proportion of poor that would be eligible for legal aid given the financial eligibility guidelines (income component) in the different jurisdictions. While the information on the plans themselves is current, the data analyses, because of limitations in the microdata, examines the situation in 1998. British Columbia, Alberta, Saskatchewan, Manitoba and Prince Edward Island have all updated their guidelines since that time. Moreover, Newfoundland and Labrador is in the process of updating their criteria.

How Old are the Criteria?

One last difference among the plans is the date when criteria were last updated. Quebec and Ontario are still using criteria that were developed in 1996. Prince Edward Island and Alberta have recently modified their criteria and are current as of 2003 and 2001 respectively. The rest of the legal aid plans are using financial eligibility criteria updated between 1997 to 2000.[148]

What are Some of the Implications for Low-income Families?

- There is no consistency across Canada. For example, a two-person family with a net income of $16,000 would be eligible for legal aid in British Columbia but not in Saskatchewan. A two-person family with $18,000 of gross income would be eligible for legal aid in Manitoba but not in Alberta, except under the program of expanded eligibility through contributions made by the applicant. Families in low income are therefore afforded different rights, depending on their province of residence. In the original example, an applicant would be given legal representation if they lived in British Columbia, but in Saskatchewan, they would either need to represent themselves or try to find legal counsel on their own. While many of Canada's social programs allow for provincial or regional differences, these differing legal aid plans present an interesting dilemma for the justice system. After all, the justice system is meant to treat everyone *equally*.

- It is obvious that there is no consistent definition of poverty or who constitutes the disadvantaged in Canada. For almost all the legal aid plans, only those who are very poor – that is, on social assistance or earning no money – are automatically eligible for free legal services. Several of the plans have questioned their criteria and have established eligibility through contributions.

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[148] Newfoundland and Labrador is in the process of updating their criteria (Email correspondence from Newman Petten, February 4, 2004).

- It is difficult to assess how the asset tests affect low income individuals. Some jurisdictions stated that this was not generally a problem because the applicants rarely had that much money or property. It does, however, raise concerns as to whether it may or may not place undue hardship on those in low income.

- If the legal aid plans use financial eligibility criteria to deny everyone *but* those who are economically disadvantaged, one would assume that their criteria must be kept somewhat current. Poverty is not static yet the plans do not appear to have any automatic mechanisms to update their financial eligibility criteria.

Appendix F – Legal Aid Manitoba Financial History

Legal Aid Manitoba Financial History

Approved Appropriation (Budget)
(Source: Manitoba Justice Annual Reports)

	2003-04	2002-03	2001-02	2000-01	1999-00	1998-99	1997-98	1996-97	1995-96	1994-95	1993-94	1992-93	1991-92	1990-91
Approved Staff Years	131	177	127	129	131	126	133	133	119	106	105	101	101	91
Salary	7,790,000	7,415,000	7,231,000	6,829,000	6,876,000	6,166,200	6,079,900	6,002,200	5,379,500	4,961,300	4,382,000	4,454,000	4,070,800	3,637,700
Operating	9,370,000	7,157,000	7,157,000	9,794,000	9,722,100	6,742,600	6,504,600	6,743,600	7,724,300	8,325,600	8,058,700	7,966,800	7,166,800	6,838,700
Less Warrior Trial Special funding				-(3,085,000)	-(3,308,900)									
Total	17,160,000	14,572,000	14,388,000	13,538,000	13,289,200	12,908,800	12,584,500	12,745,800	13,103,919	13,286,900	12,440,700	12,420,800	11,237,600	10,476,400

Expenditures as Reported by Manitoba Justice

	2003-04 (estimate at Dec 31/03)	2002-03	2001-02	2000-01	1999-00	1998-99	1997-98	1996-97	1995-96	1994-95	1993-94	1992-93	1991-92	1990-91
Salary	7,827,000	7,590,100	7,270,000	6,854,200	6,692,800	6,127,700	5,979,200	5,687,200	5,336,500	5,080,300	4,465,000	4,410,300	3,973,000	3,686,100
Operating	10,354,300	8,501,300	7,341,500	8,016,600	8,415,600	7,136,600	6,784,700	6,769,300	7,728,400	8,503,400	8,124,700	8,139,400	7,619,700	7,141,200
Less Warrior Trial Funding (see note)				-(1,199,000)	-(1,833,000)	-(311,000)								
Special Federal funding						-(154,000)								
Total Justice	18,181,300	16,091,400	14,611,500	13,671,800	13,275,400	12,799,300	12,763,900	12,466,500	13,063,900	13,583,700	12,589,700	12,549,700	11,592,700	10,827,300
Add Employee Benefits not charged to program											492,000	308,000	259,000	218,000
Pension Accrual	1,218,000	1,146,400	866,700	822,200	728,000									
Funding not recorded		30,000												
Total Manitoba Funding	19,399,300	17,267,800	15,478,200	14,494,000	14,003,400	12,799,300	12,763,900	12,466,500	13,063,900	13,583,700	13,081,700	12,857,700	11,851,700	11,045,300
(Supplemental Funding) or surplus	-(1,021,300)	-(1,519,400)	-(223,500)	-(133,800)	13,800	109,500	-(179,400)	279,300	40,019	-(296,800)	-(149,000)	-(128,900)	-(366,100)	-(360,900)

Actual Revenues and Expeditures as Reported by Legal Aid
(Source: LAM Audited Annual Financial Statements)

	2003-04 (estimate)	2002-03	2001-02	2000-01	1999-00	1998-99	1997-98	1996-97	1995-96	1994-95	1993-94	1992-93	1991-92	1990-91
General Expenditures, including pension accrual														
Community Law Office Salary	5988151	6,201,559	5,910,885	5,510,049	5,402,088	4,943,084	4,849,400	4,694,886	4,342,518	4,060,715	3,851,960	3,791,446	3,317,506	3,007,722
General Administration Salary	1838849	1,917,038	1,749,933	1,564,833	1,508,222	1,359,852	1,358,270	1,402,202	1,310,202	1,290,854	1,224,173	1,209,945	1,214,287	1,073,134
Total Salary	7,827,000	8,118,597	7,660,818	7,074,882	6,910,310	6,302,936	6,207,670	6,097,088	5,652,720	5,351,569	5,076,133	5,001,391	4,531,793	4,080,856
Community Law Office Operating	2136513	1,928,374	1,664,976	1,704,507	1,892,470	1,637,618	1,650,413	1,575,982	1,421,284	1,242,734	1,177,790	1,124,367	1,052,691	984,427
General Administration Operating	933787	877,540	946,763	985,782	1,146,796	803,617	1,247,753	590,849	515,371	570,060	625,646	469,012	431,394	463,058
Pension Accrual	1218000	1,218,034	966,687	863,842	758,882	30,721	110,092	30,966	10,831	37,533	7,274			
Designated Counsel												81,902	73,813	69,576
Total Operating	4,288,300	4,023,948	3,578,426	3,554,131	3,798,148	2,471,956	3,008,258	2,197,797	1,947,486	1,850,327	1,810,710	1,675,281	1,557,898	1,517,061
Total Office Expenses	12,115,300	12,142,545	11,239,244	10,629,013	10,708,458	8,774,891	9,215,928	8,294,885	7,600,206	7,201,896	6,886,843	6,676,672	6,089,691	5,597,917
Private Bar Fees	9,712,700	8,253,460	8,295,094	7,453,828	7,138,331	6,589,082	6,742,935	6,764,648	7,359,254	8,009,818	8,898,197	8,486,330	8,811,080	8,602,896
Less contibuted services		-(128,944)	-(152,579)	-(163,037)	-(174,493)	-(192,862)	-(192,712)							
Total Expenditures	21,828,000	20,267,061	19,381,759	17,919,804	17,672,296	15,171,111	15,766,151	15,059,533	14,959,460	15,211,714	15,785,040	15,163,002	14,900,771	14,200,813

Actual Revenues and Expenditures as Reported by Legal Aid ... continued

	2003 04	2002 03	2001 02	2000 01	1999 00	1998 99	1997 98	1996 97	1995 96	1994 95	1993 94	1992 93	1991 92	1990 91
Funding Sources														
Federal Criminal Funding	3,430,469	3,475,600	3,500,168	3,134,705	3,144,600	3,153,700	3,303,612	3,302,100	3,451,800	3,394,600	3,463,300	3,396,400	3,712,900	3,508,900
CAP/CHST Funding (See note)	1,600,000	1,600,000	1,600,000	1,600,000	1,500,000	1,500,000	1,500,000	1,800,000	1,918,600	2,209,100	2,220,300	2,276,000	1,718,000	1,666,000
Provincial Funding	14,547,531	12,046,634	10,193,211	9,759,149	9,361,890	8,145,612	7,960,331	7,364,413	7,693,500	7,980,026	7,398,208	7,186,519	6,421,067	5,870,187
Provincial funding for deficits and special programs					2,000									
Total Core Government Funding	**19,578,000**	**17,122,234**	**15,293,379**	**14,493,854**	**14,004,490**	**12,799,312**	**12,763,943**	**12,466,513**	**13,063,900**	**13,583,726**	**13,081,808**	**12,857,919**	**11,851,967**	**11,045,087**
Federal Project Funding		225,954	85,732	3,116	1,593	1,617		446	40,000	20,000	30,000	140,313	148,281	196,343
Law Foundation Grant	810,000	1,217,629	2,088,908	1,523,936	1,687,438	835,148	983,569	1,456,953	1,202,629	852,184	1,085,031	1,294,629	2,188,546	2,319,508
Client Recoveries and Other	1,440,000	1,820,405	1,727,496	1,875,739	1,722,411	1,506,485	1,749,921	1,117,290	1,159,040	1,406,113	1,234,545	1,080,243	711,441	633,404
Total Funding	**21,828,000**	**20,386,222**	**19,195,515**	**17,896,644**	**17,415,932**	**15,142,562**	**15,497,433**	**15,041,202**	**15,465,569**	**15,862,023**	**15,431,384**	**15,373,104**	**14,900,235**	**14,194,342**
Surplus (Deficit)	0.00	119,161	-(186,244)	-(23,160)	-(256,364)	-(28,549)	-(268,718)	-(18,331)	506,109	650,309	-(353,666) Note	210,102	-(536)	-(6,471)

Notes

In 1993 LAM began to convert to accrual accounting. Accounts receivable and payables were converted that year, resulting in an end of year deficit.

In the 2001/02 and the 2002/03 fiscal years, Justice provided LAM with additional funding to cover the end of year deficits of $186,000 in 01/02 and $145,500 in 02/03 to fund the total accumulated deficit. Legal Aid did not book the amounts in the year that Manitoba Justice provided the funding.

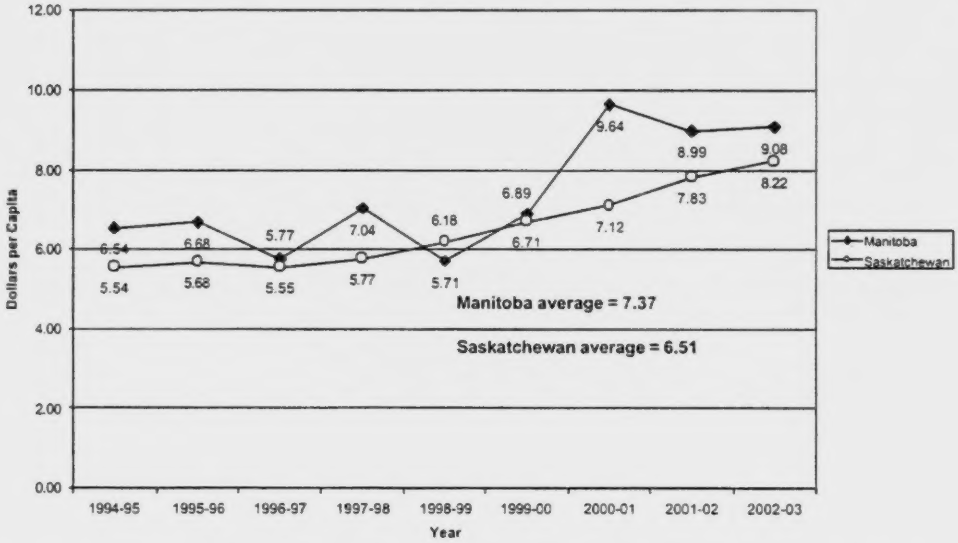
Funding was provided to Legal Aid for the Warrior trial in the approved appropriation. Legal Aid recorded the related income and costs in a segregated account.

CAP funding was not always reported as a separate item by Manitoba Justice. In 1996/97 CAP was discontinued and funding was provided as part of the CHST transfer. CAP funding has been estimated at .00295 of the total CHST funding for the years from 1996/97 to present.

Appendix G – Total Per Capita Expenditures on Criminal and Civil Matters Plus a Relevant Proportion of Central Administration – Manitoba Versus Saskatchewan

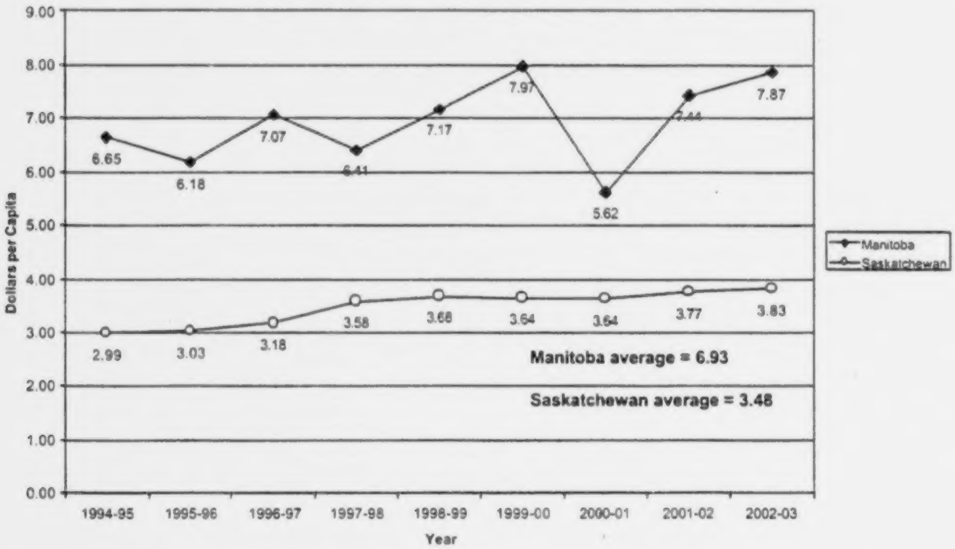
Chart G1 – Total Per Capita Expenditures on Criminal Matters Plus a Relevant Proportion of Central Administration – Manitoba Versus Saskatchewan

Source: CCJS Legal aid in Canada: resource and caseload statistics. The sole exception is 2002/03 Manitoba data which was taken directly from the 2003 Legal Aid Manitoba annual report.



This chart illustrates that Manitoba and Saskatchewan's expenditures per capita on criminal matters plus a relevant proportion of central administration are relatively close, yet for eight of the nine most current fiscal years, Manitoba's expenditures have been higher than Saskatchewan. Manitoba's average from 1994/95 to 2002/03 is $7.37 while Saskatchewan's average is $6.51.

Chart G2 – Total Per Capita Expenditures on Civil Matters Plus a Relevant Proportion of Central Administration – Manitoba Versus Saskatchewan



Source: CCJS Legal aid in Canada: resource and caseload statistics. The sole exception is 2002/03 Manitoba data which was taken directly from the 2003 Legal Aid Manitoba annual report.

This chart illustrates that Manitoba's expenditures per capita on civil matters plus a relevant proportion of central administration are significantly higher than those in Saskatchewan. Manitoba's average from 1994/95 to 2002/03 is $6.93 while Saskatchewan's average is $3.48.

Appendix H – The Tariff Across Canada

A brief overview[149] of the tariff(s) in each province is provided below.

To supplement the overview, usual fees for common services are specifically provided for each province where available.[150] The common services used for comparative purposes by the members of the Association of Legal Aid Plans of Canada are as follows: (1) the usual fee for a break and enter guilty plea; (2) the usual fee for a robbery case comprised of a one day preliminary hearing and two day trial; and (3) the usual fee for a separation with one interim motion and contested.[151]

British Columbia

The tariffs in British Columbia are set by the Board of Directors of the Legal Services Society in consultation with tariff committees, on which sit representatives of the private bar.

British Columbia has established four core tariff categories (criminal, family, immigration and appeals) and has also developed a tariff for exceptional matters. The details of each category are provided below.

- The criminal tariff is based on block fees that represent the average amount of time required for processing at an hourly rate of $72 (after holdbacks).[152] Most criminal rates are on a block fee basis. Block fees are based largely on court appearances and are meant to include all services, including preparation, that are not billable separately. Fees for service increase according to category of offence. Tariff rates do not vary according to the experience of counsel. The usual fee for a break and enter guilty plea is $200 (before holdbacks). The usual fee for a robbery case comprised of a one day preliminary hearing and two day trial is $2600 (before holdbacks).
- Family and the *Child, Family, and Community Service Act* (CFCSA) tariffs are generally $72 per billable hour (after holdbacks) up to specified maximums for preparation time. This fee is paid for all actual time spent in court. The usual fee for a separation with one interim motion and contested is up to $240 (before holdbacks). This would be covered only if violence is an issue.
- The immigration tariff is generally $72 per billable hour (after holdbacks) up to specified maximums for most work (preparation time with expert witnesses or for judicial reviews

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[149] The resources consulted in preparing this overview are as follows: (1) Legal Aid in Canada: Description of Operations, March 2001, Canadian Centre for Justice Statistics, Catalogue no. 85-217-XIB; (2) Plan updates contained in the 29th annual meeting package of the Association of Legal Aid Plans of Canada; and (3) the specific governing legislation in each province.

[150] Each province submitted a plan update to the 29th Annual Association of Legal Aid Plans of Canada Annual Meeting (August 25 – 27, 2003, Winnipeg).

[151] The usual fee for an uncontested divorce was included by the Association but not in this appendix because many of the plans do not cover uncontested divorces.

[152] The hourly rate is $80 before the ten per cent holdback. Holdbacks are amounts automatically deducted at the time of billing and apply only to fees. The holdbacks are tracked and once the accounts of the Society are audited for the fiscal year, the Board of Directors determines whether any money is available in the tariff budgets to pay the holdbacks and, if so, counsel with money deducted will receive a pro rata share of the amount available for payment.

writing arguments, etc.). Only travel costs, detention hearings, and reviews are paid at block rates (for detention hearings, this rate is $160 for the first half day and $120 for subsequent half days after holdbacks; for detention reviews it is $160 after holdbacks.)

- Tariffs for all judicial appeals generally are paid $72 per billable hour (after holdbacks) up to specified maximums for most work.
- Exceptional matters – or cases that require fees in excess of established tariffs – may qualify for enhanced fees of up to $125 per hour for senior counsel, as deemed appropriate according to criteria developed in consultation with the responsible tariff committee (criminal, family or immigration). Enhanced fees are not subject to holdbacks.

Alberta

The hourly rate in Alberta is $76 for certificates issued after April 1, 2003. No distinction is made by lawyers' years of experience. The tariff provides a combination of hourly rates and block fees. The usual fee for a break and enter guilty plea is $380. The usual fee for a robbery case comprised of one day preliminary hearing and two day trial is $2132. The usual fee for separation, often limited to five hours (restricted coverage) is $380.

Saskatchewan

The legal aid tariff rates in Saskatchewan are reviewed periodically by the Legal Aid Commission in consultation with the Law Society. The fee structure does not depend on lawyers' experience or court level. Fees vary by the type of legal problem only. The Commission uses a modified block fee tariff for both civil and criminal matters, and an hourly based tariff for certain criminal matters.

The tariff in Saskatchewan is $60 per hour for preparation and $60 per hour for court, as of November 1, 2000. The usual fee for a break and enter guilty plea is $410 (average cost). The usual fee for a robbery case comprised of a one day preliminary hearing and two day trial is $970 (average cost). The usual fee for a separation with one interim motion and contested is $450 (average cost).

Ontario

The hourly rate in Ontario for certificates issued on or after April 1, 2003 has three levels. The base rate (level one) is $73.87 – for lawyers with less than four years experience. This rate is subject to an increase of 12.5 per cent for a lawyer with more than four to less than ten years of experience (level two). Moreover, the base rate is subject to an increase of 25 per cent for a lawyer with ten years or more of experience (level three). Modified rates apply for junior counsel. The fees for law clerks, articled students and investigators who work for a lawyer are $23 per hour. The fee for advice lawyers providing interviews and advice to applicants including any necessary correspondence is $57 per hour.

The tariff is organized into five schedules in regulation: fees in criminal matters, fees in civil matters, fees for lawyers providing services of law clerks, articled students and investigators, fees for duty counsel and fees of advice lawyers. Maximum allowable hours are specified in some schedules. Block fees have been established for some civil matters and supplementary specific appearance fees have been established for duty counsel.

Lawyers' fees are hard-capped in regulation at $157,500 per annum for level one lawyers, and $177,190 and $196,875 respectively for level two and level three lawyers.

The usual fees for a break and enter guilty plea, robbery case and separation were not provided by Legal Aid Ontario in the plan updates for the 29th Annual Association of Legal Aid Plans of Canada Annual Meeting materials.

Quebec

In Quebec, fees paid for legal services vary, depending on the offence and the court. The tariff is based on block fees for various services provided in civil and criminal actions. It provides for the payment of fees in excess of those set out if the mandate has unusual aspects.

The present tariff was the subject of an agreement between the Minister of Justice and the Quebec bar on December 14th, 2000. The tariff of fees is set out in Schedule II of the agreement and is organized into three main categories: general civil tariff; tariff in criminal and penal proceedings under the YOA; and tariff for miscellaneous proceedings. The usual fee for a break and enter guilty plea is $525. The usual fee for a robbery case comprised of a one day preliminary hearing and two day trial is $925. The usual fee for a separation with one interim motion is $1000.

New Brunswick

In New Brunswick, counsel fees depend on the nature of the charge, the lawyer's experience, and the court in which the case is tried. The fee for criminal and domestic certificates is based on a combination of an hourly rate and some block fees.

The tariff is organized into four main parts in regulation: fees in criminal matters, fees for duty counsel in criminal matters, fees in civil matters, and fees for solicitors providing services of law clerks, articled students and investigators. Maximum allowable fees and hours are provided in some parts. There are three levels of lawyer experience reflected in the criminal tariff-of-fees. As of 1988, junior lawyers with less than two years of experience are generally paid at an hourly rate of $48 in criminal courts. Lawyers with two to five years of experience receive $54 per hour. Senior lawyers with over five years of experience are paid at a rate of $60 per hour. For domestic legal aid and in court appointed cases, lawyers receive $43 per hour for their services. The fees for law clerks, articled students and investigators who work for a lawyer are $15 per hour.

The usual fee for a break and enter guilty plea is determined as an average fee for all break and enters which is $693. The usual fee for a robbery case comprised of a one day preliminary hearing and two day trial is determined as an average fee for all robberies, which is $1283. The usual fee for a separation with one interim motion is not applicable in New Brunswick.

Nova Scotia

In Nova Scotia the tariff provides a range of fees depending on the case, the proceeding, the court in which the case is heard, and the lawyer's experience. It reflects fees customarily paid by a client of modest means.

Fees are set by regulation passed by the Governor-in-Council pursuant to the *Legal Aid Act*. The tariff of fees is organized into three topical categories: criminal tariff for preparation times and appearances; family and civil tariff for preparation times and appearances; and special matters. Maximum allowable hours are specified in the regulation.

Effective August 1, 2003, preparation times and counsel fees for court appearances are paid at a rate of $60 per hour, subject to the following. (1) A solicitor with five or more completed years of seniority at the Bar is paid at the rate of $70 per hour for preparation and court appearances; and (2) A solicitor with ten or more completed years of seniority at the Bar is paid at the rate of $85 per hour for preparation and court appearances if the offence carries of mandatory life sentence (e.g. murder). For hearings in the Supreme Court of Canada, the hourly rate is $65 per hour for lawyers with less than five years at the Bar and $75 per hour for lawyers with five years or more at the Bar.

The usual fees for a break and enter guilty plea, robbery case and separation were not provided by Nova Scotia Legal Aid in the plan updates for the 29th Annual Association of Legal Aid Plans of Canada Annual Meeting materials.

Newfoundland & Labrador

The hourly rate is $45 per hour for lawyers with less than five years at the Bar; these lawyers receive $50 per hour for duty counsel and the Supreme Court. The hourly rate is $55 per hour for lawyers with more than five years at the Bar; these lawyers receive $60 per hour for duty counsel and the Supreme Court. Maximum allowable hours are specified. These rates were implemented in 1992.[153]

The review and revision of the tariff is the joint responsibility of the Department of Justice and the Law Society, in consultation with the Newfoundland and Labrador Legal Aid Commission.

The usual fees for various legal matters are as follows: break and enter (guilty plea) - $135-$165; robbery (one day for the preliminary inquiry and 2 days for the trial) - $1,710-$2,090; and separation (one interim motion – contested) -$360-$440.

Prince Edward Island

In criminal and civil cases, private counsel are paid an hourly rate of $60 for case preparation and court time.[154] The ceiling for preparatory work depends on the complexity of the case; however, there is no ceiling on court time. The tariff does not set a rate for criminal duty counsel because this function is served by staff lawyers. Higher fees may be authorized by the Senior Counsel on the basis of lawyer experience, the level of court, linguistic requirements or other special circumstances.

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[153] Petten *supra* note 31.

[154] The hourly rate is $60 per hour for lawyers with both less than and more than five years at the Bar.

The usual fees for various legal matters are as follows: break and enter (guilty plea) – six hours preparation; robbery (one day for the preliminary inquiry and 2 days for the trial) – ten to twenty hours preparation; and separation (one interim motion – contested) – ten hours preparation. (It is important to note that most criminal services in these categories are provided by staff lawyers. In criminal cases referred to the private bar, preparation time is negotiated at the time of authorization.)

Appendix I – Private Bar Completed Cases and Average Cost per Case

Private Bar Completed Cases and Average Cost per Case
Fiscal Year ending March 31

	1989/90	1990/91	1991/92	1992/93	1993/94	1994/95	1995/96	1996/97	1997/98	1998/99	1999/00	2000/01	2001/02	2002/03
Criminal Adult														
Number of Certificates	9,406	8,552	8,095	7,739	7,565	7,529	7,053	5,842	4,867	5,655	5,688	5,684	5,893	6,685
Dollar value	4,083,473	4,176,623	3,916,023	3,564,588	3,558,213	3,556,007	3,160,284	2,807,392	3,122,522	2,807,996	3,141,538	3,448,019	4,446,725	4,531,297
Average Cost	434.13	488.38	483.76	460.60	470.35	472.31	448.07	480.56	641.57	496.55	552.28	606.62	754.58	678
Criminal Youth														
Number of Certificates	1,995	1,859	1,993	1,921	1,804	1,847	1,921	1,381	1,139	1,387	1,232	1,229	1,097	1,453
Dollar value	681,909	670,281	704,922	674,089	636,616	646,836	615,157	531,480	567,536	528,937	503,064	531,592	635,063	633,403
Average Cost	341.81	360.56	353.70	350.91	352.89	350.21	320.22	384.86	498.28	381.35	408.33	432.54	578.91	435.93
Family														
Number of Certificates	6,660	6,692	7,081	6,901	6,689	7,286	6,858	5,771	5,422	5,569	5,501	5,142	4,702	5,794
Dollar value	3,346,476	3,684,142	4,118,305	4,160,961	3,948,374	4,000,751	3,674,900	3,326,805	2,903,790	3,043,402	3,029,656	3,007,821	2,694,244	3,382,328
Average Cost	503.03	550.53	581.60	602.95	590.28	549.11	535.85	576.47	535.56	546.49	550.75	584.95	573.00	583.76

Appendix J – Detailed Calculations for the Hourly Rate per Lawyer Approach

Hourly Rate Approach
Explanation of Worksheet 1

This worksheet takes the total costs of the community law offices and uses those costs to calculate an hourly rate per lawyer which will then be used to calculate an average cost per case. The worksheet uses hours reported by staff lawyers on cases completed in the 2002/03 fiscal year to calculate an hourly cost per lawyer. The hours as reported are then multiplied by the calculated hourly rate to arrive at a cost for completed cases. The calculated amount is then divided by the number of completed cases to arrive at the hourly cost per case.

Worksheet 1

Worksheet to calculate costs associated with staff lawyers and to calculate average cost per case

Determination of Average Cost per Closed Case for Community Law Offices

Based on Total Actual Costs of Community Law Offices and average hourly rate per lawyer, based on reported hours
Breakdown of Costs for Community Law Offices for the 2002/03 fiscal year

Total Hours worked	Criminal Office	Family Office	Regional Criminal	Regional Family
Certificates	5894	17880	2577	7446
Certificate Equivalents	10673	1043	4442	243
Total Hours	16567	18923	7019	7689
Hourly Rate	**$ 97.30**	**$ 135.85**	**132.77**	**132.93**
Total Certificates Processed	3398	2161	2276	1061
Total Cost	$ 1,611,921	$ 2,555,492	$ 931,943	$ 1,021,364
Average Cost	**474.37**	**1182.55**	**409.47**	**962.64**
Standard Billable Hours	1600.00	1600.00	1600.00	1600.00
Actual Results				
Average Billable Hours	1662.00	1586.00	1614.00	1614.00

Cost of Operations

	Legal Salaries	Paralegals	Support Salaries	Students	Operating Costs	Disbursement Costs	Net Operating	Total Overhead
Family Law Office	1,047,061	180,692	373,213	75,497				
Additional Support Position			37,400					
Legal Salary Increase	94,235							
Less Paralegal Duty Counsel work			- 86,600					
Subtotal	1,141,296	180,692	324,013	75,497				
Pension Accrual	171,194	27,104	48,602					
Severance/Vacation Accrual	15,978	2,530	4,536					
Benefits Accrual	20,394	3,678	8,024	1,337	517,204			
Total Family	1,348,863	214,003	385,175	75,497	517,204 -	144,471	372,733	1,047,409
Number of Lawyers	11.09							
Criminal Law Office	1,291,785	133,274	227,216	58,359				
Legal Salary Increase	116,261							
Additional Support Positions			112,200					
Pension Accrual	193,768	19,991	34,082					
Benefit Accrual	23,895	2,323	5,974	996				
Severance/Vacation Accrual	18,085	1,866	3,181		420,260			
Total Criminal	1,643,793	157,454	382,653	59,355	420,260 -	17,035	403,225	1,002,687
Number of Lawyers	17.00							

Cost of Operations

	Legal Salaries	Paralegals	Support Salaries	Students	Operating Costs	Disbursement Costs	Net Operating	Total Overhead
Regional offices								
Westman (Brandon)	349,863	70,627	138,124		126,876			
Parklands (Dauphin)	239,018	86,143	121,421		139,765			
Northlands (The Pas)	259,262	48,450	82,654	5,028	119,554			
Thompson	347,840	131,552	131,552		173,991			
Subtotal	1,195,983	336,772	473,751	5,028				
Legal Salary Increase	107,638							
Pension Accrual	179,397	50,516	71,063					
Benefits Accrual	23,519	6,782	9,574					
Severance/Vacation Accrual	16,744	4,715	6,633		560,186			
Total Regional	1,523,282	398,785	561,020	5,028	560,186 -	39,471	520,715	1,485,548
Net Costs Associated with Cases								
Criminal at 49%	746,408	195,404 -	274,900	2,464			255,150	727,918
Civil at 51%	776,874	203,380 -	286,120	2,564			265,565	757,629
Number of Lawyers Criminal	6.94							
Number of Lawyers Civil	7.22							

Breakdown of Work Performed

	Certificates	Certificate Equivalents	Opened Files Total		Certificates	Certificate Equivalents	Closed Files Total
Family Law	1568	365	1933		1876	285	2161
Criminal Law	333	3135	3468		705	2693	3398
Regions	1259	2236	3495	Criminal Civil			2276 1061

Hourly Rate is calculated as follows: (Total Legal salaries/number of lawyers + Total overhead/number of lawyers)/standard billable hours

Hourly Rate Approach
Explanation of Worksheet 2

This worksheet is used to calculate the average cost per case at the base or staring point for the approach. The base average cost is determined by dividing the total costs of the office by the production of the office plus an average disbursement cost amount.

The worksheet can then be used to recalculate the average cost per case, should one of the office costs variables change, such as the salary costs or production levels. The "multiplier" as shown in the worksheet allows us to change the value of one of the variables by a percentage increase (or decrease) to the base.
The multiplier worksheet will then recalculate the value of the variable and incorporate the new value into the average cost per case.

Worksheet 2

Worksheet to calculate average cost for staff lawyers and to change value of staff cost variables

Average Cost per Case for Staff Lawyers for Certificate Processing

	Criminal	Family	Regional Criminal	Regional Family
Legal Salaries	1,643,793	1,348,863	746,408	776,874
Paralegal Salaries	157,454	214,003	195,404	203,380
Support Staff Salaries	382,653	385,175	274,900	286,120
Student Salaries	59,355	75,497	2,464	2,564
Operating	403,225	372,733	255,150	265,565
Total Overhead	1,002,687	1,047,409	727,918	757,629
Hourly Rate	97	135	133	133
Hours	16,567	18,923	7,019	7,689
Base Volume	3,398	2,161	2,276	1,061
Cost	1,611,921	2,555,492	931,943	1,021,364
Average Cost/Case	474.37	1182.55	409.47	962.64
Disbursements	5.01	66.24	5.01	66.24
Total Average Cost	479.38	1248.79	414.48	1028.88

Multipliers	1
Legal Salaries	1
Paralegal Salaries	1
Support Staff	1
Students	1
Operating	1
Volume	1 Note(always leave this multiplier as 1)

Determination of Average Disbursement Costs

	Criminal Office	Family Office
Reported disbursement costs per financials	17035	144471
Number of closed certificates	3398	2181
	5.01	66.24

Hourly Rate Approach
Explanation for Worksheet 3

This worksheet is used to calculate the average cost for cases sent to the private bar. The average cost is calculated using the actual average cost for the 2002/03 fiscal year, adjusted for factors such as the cost of large cases and for administrative costs and for the new tariff rate that came into effect on April 1, 2003.

The worksheet determines a base cost for processing a fixed volume of certificates with the private bar and recalculates the base cost when various percentage increases are applied to represent increases in the tariff.

Worksheet 3

Worksheet used to calculate average cost for the private bar and to change tariff rates

Calculation of Private Bar Average Cost

	Dollars	Certificates	Average Cost Per Case
Criminal Case Private Bar fees & disbursements for 2002/03	4,531,297.00	6685	677.83
Youth Case Private Bar fees for 2002/03	633,403.00	1453	435.93
Less "Complex" Cases	-1,099,229.00	-39	
Total Criminal Cases	4,065,471.00	8,099	501.97
Family Case Private Bar Fees for 2002/03	3,382,328.00	5794	583.76
Total Certificates		13,893	

Note: Large Complex cases have been removed from the private bar calculation as they will need to be managed differently from the more common case types. Large complex cases tend to skew the average cost per case and therefore the average has been adjusted.

Result of Tariff Increase (increase as of April 1 has increased the tariff by 20%)

	Adjusted Tariff	Overhead	Total Average Cost	Certificates	Adjusted Base
Criminal Increase	602.37	17.17	619.53	8,099	5,017,602
Family Increase	700.52	16.00	716.51	5794	4,151,485

		Tariff Multiplier	
	Increase	Rate	Overhead
Criminal	1	602.37	17.17
Family	1	700.52	16.00

Adjusted Certificate number

Calculation of Overhead costs

	Staff Years	
111500	3	
32500	1	
34400	1	
178400	5	
19624		
10704		
23000	@4600 per person	
231728	use a 60/40 split of the costs to criminal and civil certificates	
139,037	8099 Certificates	17.17
92,691	5794 Certificates	16.00

Hourly Rate Approach
Explanation of Worksheet 4

This worksheet will calculate the net cost or savings as a result of the change in the mix of the number of certificates assigned to the staff or the private bar. It calculates the costs or savings based on the average costs per case as determined in the previous worksheets. The worksheet provides a summary of what variables have been changed to arrive at the cost or savings as well as what the new mix of work is between the private bar and the staff.

In the sample worksheet provided we show the results of changing the split to a 95% staff and 5% private bar for both criminal and family cases.

Worksheet 4

Worksheet used to calculate savings or costs as a result of changing mix of staff to private bar certificate work

Determination of net cost (savings) as a result of changeover to staff lawyers.

Assumptions	Increase
Legal staff Salary	0%
Paralegal Staff Salary	0%
Support Staff Salary	0%
Operating Costs	0%

Volume of Certificates-Staff	Base	Multiplier Factor for Certificates	Adjusted Certificate Totals
Criminal Law Office	3398	2.31	7849
Family Law Office	2161	2.75	5943
Regional Criminal	2276	2.31	5258
Regional Family	1061	2.75	2918
Certificate Volume	8896		21967

Volume of Certificates Private Bar		Multiplier Factor for Certificates	Adjusted Certificate Totals
Criminal (Winnipeg)	6192	0.085	526
Family (Winnipeg)	4893	0.08	391
Criminal (Regions)	1907	0.085	162
Family (Regions)	901	0.08	72
			1152

Private Bar Tariff Increase	
Criminal	0%
Family	0%

Total Certificate Volume	
Criminal	13795
Family	9324
Total Certificates	23119

Mix of Certificates	Staff	Private Bar
Criminal	95.01%	4.99%
Family	95.03%	4.97%

Staff Component -Incremental costs	Average Cost Per Case	# of Certificates	Total Cost	Base Cost & Disbursements	Incremental Cost
Criminal	479.38	7849	3,762,863	1,628,945	2,133,918
Family	1248.79	5943	7,421,251	2,698,637	4,722,614
Regional Criminal	414.48	5258	2,179,129	943,346	1,235,783
Regional Family	1028.88	2918	3,002,022	1,091,645	1,910,377
Total Certificates		21967			
Private Bar Fees- Adjusted Costs					
Criminal	619.53	688	426,496	5,017,602 -	4,591,106
Family	716.51	464	332,119	4,151,485 -	3,819,366
Total Certificates		1152			

Worksheet 4 ... continued

Calculation of savings or costs from the conversion-Criminal

	Certificates	Staff	Private Bar	
Winnipeg	8376	7849	526	
Regional	5420	5257.56	162	
Incremental Costs to increase Staff				
Winnipeg				2,133,918
Regional				1,235,783
Savings on Private Bar Certificates				- 4,591,106
Cost or (savings)				- 1,221,405
Net (savings) cost				- 1,221,405

Calculation of savings or costs from the conversion-Family

	Certificates	Staff	Private Bar	
Winnipeg	8241	7849	391	
Regional	2990	2917.75	72	
Incremental Costs to increase Staff				
Winnipeg				4,722,614
Regional				1,910,377
Savings on Private Bar Certificates				- 3,819,366
Net (savings) cost				2,813,625
Total cost (savings)				1,592,220

Number of Additional lawyers

Criminal @280 files per lawyer	27
Family @180 files per lawyer	31

Number of Additional Support Staff

Criminal at 1 support to 3 lawyers	9
Family at 1.5 support to 2 lawyers	21

Appendix K – Certificate and Certificate Equivalent History

	Criminal					Youth						Civil				
		Certificate					Certificate						Certificate			
Year ending March 31	Private Bar	Staff	Equivalents	Total Staff	Total	Private Bar	Staff	Equivalents	Total Staff	Total	Total Criminal Adult & Youth	Private Bar	Staff	Equivalents	Total Staff	Total
1993/94	8202	3223		3223	11425	2100	1486		1486	3586	15011	7728	2929		2929	10657
1994/95	6657	2456		2456	9113	1845	1519		1519	3364	12477	7206	3004		3004	10210
1995/96	6992	2245		2245	9237	1743	1603		1603	3346	12583	6822	3059		3059	9881
1996/97	5850	1530		1530	7380	1347	556		556	1903	9283	5899	3167		3167	9066
1997/98	5187	1282	2557	3839	9026	1222	268	756	1024	2246	11272	5936	3114	288	3402	9338
1998/99	5644	1389	2866	4255	9899	1303	244	848	1092	2395	12294	5553	3173	323	3496	9049
1999/00	5878	1491	2981	4472	10350	1261	241	882	1123	2384	12734	5489	3014	336	3350	8839
2000/01	6299	1241	3375	4616	10915	1295	193	998	1191	2486	13401	5900	2699	380	3079	8979
2001/02	6695	972	3419	4391	11086	1348	129	1011	1140	2488	13574	5708	2666	385	3051	8759
2002/03	6765	630	4073	4703	11468	1399	145	1204	1349	2748	14216	5207	2616	459	3075	8282

Year ending March 31	Total Certificates	Per Cent Private Bar	Per Cent Staff
1993/94	25668	70%	30%
1994/95	22687	69%	31%
1995/96	22464	69%	31%
1996/97	18349	71%	29%
1997/98	20610	60%	40%
1998/99	21343	59%	41%
1999/00	21573	59%	41%
2000/01	22380	60%	40%
2001/02	22333	62%	38%
2002/03	22498	59%	41%

Notes: Certificate equivalents were allocated based on the 2002/03 percentages of 71% adult, 21% youth and 8% civil

Appendix L – Detailed Calculations for the New Certificate Production Office Approach

New Certificate Production Office Approach
Explanation of Worksheet 1

In the first worksheet we have determined the salary and operating costs associated with the new certificate office. The worksheet provides information on the base salary for each of the positions the number of staff in each of the staffing categories and details of the salary and operating cost calculations. The worksheet also determines the number of certificates that will be processed at a given production level. If the base production level is changed, the worksheet will automatically recalculate a new number of certificates to be processed.

Worksheet 1

Worksheet to calculate the cost of the office and the production level of the office

Determination of Expenses Related to a Staff Lawyer

	Junior Lawyers	Senior Lawyers	Supervising Attorney	Paralegals	Articling Students	Support Salaries	Total	Operating Cost Total for all Staff	Total Cost
Family Law Office									
Base salary	658,000	197,400	104,600	77,800	50,000	326,000	1,413,800		
Benefits	72,380	21,714	11,506	8,558		35,860	150,018		
Pension	40,796	12,239	6,485	4,824		20,212	84,556		
Total	771,176	231,353	122,591	91,182	50,000	382,072	1,648,374	352,430	2,000,804
Number of positions	10	2	1	2	2	10	27		
Base salary	65,800	98,700	104,600	38,900	25,000	32,600			
Criminal Law Office									
Base salary	658,000	197,400	104,600	38,900	50,000	163,000	1,211,900		
Benefits	72,380	21,714	11,506	4,279		17,930	127,809		
Pension	40,796	12,239	6,485	2,412		10,106	72,038		
Total	771,176	231,353	122,591	45,591	50,000	191,036	1,411,747	285,510	1,697,257
	10	2	1	1	2	5	21		
	65,800	98,700	104,600	38,900	25,000	32,600			

Notes:

Operating Costs- Lawyer	Base	Family	Criminal	
Amortization costs of furniture etc. (lawyer)*	600	16,200	12,600	Assumes $6000 in furniture is required, amortized at 10%
Computer costs (lawyer)	2000	54,000	42,000	
Telephone costs	1000	27,000	21,000	
Equipment costs*	670	18,090	14,070	Total cost is $67,000 for current 97 staff
Office expenses*	1800	48,600	37,800	2003/04 total is $177,000 divided by CLO staff of 97 is 1800 per person
Library*	400	5,200	5,200	Per lawyer basis
Rent*	5000	135,000	105,000	Total rent for 2003/04 is $415,000, divided by Staff of 97
Professional Fees*	1085	14,105	14,105	Per lawyer basis
Professional Insurance*	845	10,985	10,985	Per lawyer basis
Staff Development(Lawyer)	300	3,900	3,900	
Staff development (other staff)	200	2,400	2,200	
Recruitment costs	50	1,350	1,050	
Travel costs*	1200	15,600	15,600	Per lawyer basis
Total		352,430	285,510	

Determination of Base Productivity for the Office

	Family	Criminal	
Base Production	180	280	
Junior Lawyers	1800	2800	
Senior Lawyers	360	560	
Supervising Attorney	90	140	assumes 50% caseload
Total	2250	3500	

New Certificate Production Office Approach
Explanation of Worksheet 2

This worksheet is used to calculate the average cost per case at the base or staring point for the approach. The base average cost is determined by dividing the total costs of the office by the production of the office plus an average disbursement cost amount.

The worksheet can then be used to recalculate the average cost per case, should one of the office costs variables change, such as the salary costs or production levels. The "multiplier" as shown in the worksheet allows us to change the value of one of the variables by a percentage increase (or decrease) to the base.
The multiplier worksheet will then recalculate the value of the variable and incorporate the new value into the average cost per case.

Worksheet 2

Worksheet to calculate the average cost for staff lawyers, using different cost factors

Average Cost per Case for Staff Lawyers for Certificate Processing

	Criminal Base Costs	Family Base Costs
Junior Lawyer salaries	771,176	771,176
Senior Lawyer salaries	231,353	231,353
Supervising Attorney salary	122,591	122,591
Paralegal salary	45,591	91,182
Articling Student salary	50,000	50,000
Support Staff salary	191,036	382,072
Operating cost	285,510	352,430
Total Cost	1,697,257	2,000,804
Base Casework	3,500	2,250
Average Cost	484.93	889.25
Average Disbursement Cost	5.02	66.24
Total Average Cost per Case	489.95	955.49

Multipliers

Junior Lawyer	1
Senior Lawyer	1
Supervising Attorney	1
Paralegal	1
Articling Student	1
Support Staff	1
Operating	1
Criminal Base	1
Family Base	1
Disbursements	1

Determination of Average Disbursement Costs

	Criminal Office	Family Office
Reported disbursement costs per financials	17035	144471
Number of closed certificates	3398	2181
Average disbursement costs	5.01	66.24

New Certificate Production Office Approach
Explanation of Worksheet 3

This worksheet is used to calculate the average cost for cases sent to the private bar. The average cost is calculated using the actual average cost for the 2002/03 fiscal year, adjusted for factors such as the cost of large cases and for administrative costs and for the new tariff rate that came into effect on April 1, 2003.

The worksheet determines a base cost for processing a fixed volume of certificates with the private bar and recalculates the base cost when various percentage increases are applied to represent increases in the tariff.

Worksheet 3

Worksheet to calculate the average cost for the private bar using various tariff rate increases

Calculation of Private Bar Average Cost

	Dollars	Certificates	Average Cost Per Case
Criminal Case Private Bar Fees & Disbursements for 2002/03	4,531,297	6685	677.83
Youth Case Private Bar fees for 2002/03	633,403	1453	435.93
Less "Complex" Cases	-1,099,229	-39	
Total Criminal Cases	4,065,471	8,099	501.97
Family Case Private Bar Fees for 2002/03	3,382,328	5794	583.76
Total Certificates		13,893	

Note: Large Complex cases have been removed from the private bar calculation as they will need to be managed differently from the more common case types. Large complex cases tend to skew the average cost per case and therefore the average has been adjusted.

Result of Tariff Increase (increase as of April 1 has increased the tariff by 20%)

	Adjusted Tariff	Overhead	Total Average Cost	Certificates	Adjusted Base
Criminal Increase	602.37	17.17	619.53	8,099	5,017,602
Family Increase	700.52	16.00	716.51	5794	4,151,485

	Increase	Tariff Multiplier Rate	Overhead	Revised Average Cost	New Base
Criminal	1	602.37	17.17	619.53	5,017,602
Civil	1	700.52	16.00	716.51	4,151,485

Adjusted Certificate number

Calculation of Overhead costs

			Staff Years	
Taxation Clerks	111500		3	
Accounting Clerks	32500		1	
Data Entry	34400		1	
	178400		5	
Benefits	19624			
Pension	10704			
overhead	23000		@4600 per person	
	231728	Using a 60/40 split of the costs to criminal and civil certificates		
	139,037	8099 Certificates		17.17
	92,691	5794 Certificates		16.00

New Certificate Production Office Approach
Explanation of Worksheet 4

This worksheet will calculate the net cost or savings as a result of the change in the mix of the number of certificates assigned to the staff or the private bar. It calculates the costs or savings based on the average costs per case as determined in the previous worksheets. The worksheet provides a summary of what variables have been changed to arrive at the cost or savings as well as what the new mix of work is between the private bar and the staff.

In the sample worksheet provided we show the results of changing the split to a 95% staff and 5% private bar for both criminal and family cases.

Worksheet 4

Worksheet to calculate net cost or savings from a change in the mix of cases to staff and private bar

Determination of net (savings) cost as a result of changeover to staff lawyers.

Assumptions	**Increase**		
Legal Staff Salary	0%		
Paralegal Staff Salary	0%		
Support Staff Salary	0%		
Operating Costs	0%		
Volume of Certificates-Staff	Closed Certificates as of March 31/03		
Criminal Law Office	5674		
Family Law Office	3222		
Base Production Rate			
Criminal	280		
Family	180		
Volume of Certificates-Private Bar	Base	Addition (reduction)	Adjusted Certificate Totals
Criminal	8099	-7410	689
Family	5794	-5343	451
Current Volume of Staff			
		Addition (reduction)	
Criminal	5674	7410	13084
Family	3222	5343	8565
			10036
Private Bar Tariff Increase			
Criminal	0%		
Family	0%		
Total Certificates			
Mix of Certificates	**Staff**	**Private Bar**	
Criminal	95.00%	5.00%	
Family	95.00%	5.00%	

Staff Component -incremental costs	Average Cost Per Case	# of Certificates	Total Cost	Base cost	(Savings) Cost
Criminal	489.95	7410	3,630,533		
Family	955.49	5343	5,105,162		
Private Bar Fees- Adjusted Costs					
Criminal	619.53	689	426,859	5,017,602	- 4,590,743
Family	716.51	451	323,148	4,151,485	- 3,828,337

Calculation of Savings or costs from the conversion-Criminal

Costs to increase number of certificates processed by staff		3,630,533
Savings on Private Bar Certificates	-	4,590,743
Cost or (savings)	-	960,210

Calculation of Savings or costs from the conversion-Family

Costs to increase number of certificates processed by staff			5,105,162
Savings on Private Bar Certificates		-	3,828,337
Cost or savings			1,276,825
Net (savings) cost			316,615 -
Number of Additional lawyers			
Criminal lawyers	Base caseload	280	26
Family Lawyers	Base caseload	180	30
Number of additional support staff			
Criminal at 1 for every 3 lawyers			9

Appendix M – Summary of Results of the Various Scenarios

New Certificate Production Office Approach

Variable	Criminal Production	Family Production	Average Cost Per Case Criminal	Average Cost Per Case Family	Criminal Savings (Cost)	Family Savings (Cost)	Net Savings (Cost)	Year 1 Transition Costs	Net Savings (Cost) Year 1	Start up Funding	# of Additional Lawyers-Criminal	# of Additional Lawyers-Family	# of Additional Support Staff
90/5 split Criminal and Family	200	180	480.95	956.49	960,210	(1,276,025)	(315,815)	(4,306,797)	(4,622,612)	650,000	26	18	21
	250	180	548.14	956.49	529,030	(1,276,025)	(747,995)	(4,306,797)	(5,054,612)	900,000	19	18	18
	300	180	457.12	956.49	1,199,[illegible]	(1,276,025)	(77,[illegible])	(4,306,797)	(4,383,[illegible])	630,000	25	18	23
90/5 split Criminal and Family Salary increases to top of scale for classifications in 7 years time No tariff increases	200	180	576.60	1103.26	317,541	(2,066,357)	(1,748,816)	N/A			26	18	
	250	180	646.29	1103.26	(190,780)	(2,066,357)	(2,257,137)	N/A			30	18	
	300	180	538.57	1103.26	599,941	(2,066,357)	(1,466,416)	N/A			25	18	
90/5 split Criminal and Family Salary increases to top of scale for classifications in 6 years time Tariff increase of 3% per annum	200	180	576.60	1103.26	1,254,880	(1,280,356)	(25,476)	N/A					
	250	180	646.29	1103.26	746,562	(1,280,356)	(533,794)	N/A					
	300	180	538.57	1103.26	1,537,283	(1,280,356)	256,927	N/A					
70/30 split Criminal only No change to family	200	180	480.95	956.49	515,092		515,092	(1,116,316)	(601,224)	140,000	14		5
	250	180	548.14	956.49	283,781		283,781	(1,116,316)	(832,535)	210,000	16		5
	300	180	457.12	956.49	643,599		643,599	(1,116,316)	(472,717)	170,000	13		4
50/50 split Criminal only No change to family	200	180	482.[illegible]	956.49	115,888		115,888	(341,729)	(225,841)	50,000	4		1
	250	180	517.5	956.49	85,884		85,884	(341,729)	(255,845)	70,000	5		2
	300	180	412.[illegible]	956.49	194,780		194,780	(341,729)	(146,949)	50,000	4		1
Addition of 13 lawyers to criminal side No change to family (basic model 3) (results in 64/36)	200	180	480.95	956.49	453,541		453,541	(979,824)	(526,283)	170,000	13		4
	250	180	548.14	956.49	223,028		223,028	(888,496)	(665,[illegible])	170,000	12		4
	300	180	457.12	956.49	607,109		607,109	(1,047,912)	(440,803)	170,000	13		4
Addition of 10 lawyers to criminal side only (results in 60/40 split)	200	180	520.[illegible]	956.49	262,870		262,870	(717,364)	(454,494)	130,000	10		3
	250	180	582.[illegible]	956.49	97,743		97,743	(708,241)	(610,498)	130,000	10		3
	300	180	486.[illegible]	956.49	379,637		379,637	(842,[illegible])	(462,[illegible])	130,000	10		3

Hourly Rate per Lawyer Approach

Variable	Criminal Production	Family Production	Average Cost Per Case Criminal	Average Cost Per Case Family	Criminal Savings (Cost)	Family Savings (Cost)	Net Savings (Cost)	Year 1 Transition Costs	Net Savings (Cost)	Start up Funding	# of Additional Lawyers-Criminal	# of Additional Lawyers-Family	# of Additional Support Staff
95/5 split Criminal and Family	280	100	479.38	1248.79	1,221,405	(2,813,625)	(1,592,220)	(4,306,797)	(5,899,017)	880,000	27	31	30
70/30 split criminal only			479.38	1248.79	629,596		629,596	(1,116,316)	(486,720)	190,000	14		5
50/50 criminal only					212,480		212,480	(341,729)	(129,249)	50,000	4		1
Add 10 lawyers to criminal (results in 61/39 split)			479.38	1248.79	390,534		390,534	(774,587)	(384,053)	130,000	10		3

Appendix N – British Columbia Governance Provisions

Introduction

British Columbia provided a number of their core governance materials to the review and a summary of their contents is provided below. The following documents were reviewed: (1) *The Legal Services Society Act*; (2) General By-Law; (3) Conflict of Interest By-Law; (4) Indemnification By-Law; (5) Memorandum of Understanding (MOU); and (6) Legal Services Society Board Governance Manual.

Highlights of the documents are provided below for reference purposes.

1. Legislation

- The British Columbia Act provides for a board with a diverse membership. All appointments must consider contributions to the knowledge, skills and experience of the board as a whole in the following areas: business, management and financial matters; law and operation of the courts, tribunals and alternative dispute resolution; the provision of legal aid; the cultural and geographic diversity of the province; and the social and economic circumstances associated with the special legal needs of low income individuals.
- The Act clearly articulates the roles, objects and principles of the Legal Services Society (the Society). In short, the role of the Society is to assist low income individuals to resolve their legal problems and facilitate access to justice for low income individuals.
- The Act sets out that the Society is not an agent of the government or of the law society.
- The Act provides that the board must appoint an executive committee, which has all the powers of the board between meetings. (The specific role of the committee is provided for in the by-laws.)
- The Act provides that the board is empowered to, among other functions, establish priorities, establish policies, determine methods, determine eligibility, etc.
- The Act provides that total expenditures in a given fiscal year must not exceed total revenues unless such expenditures are first approved by the Attorney General (AG) and the Minister of Finance.
- The Act provides that a budget must be proposed to the AG on or before November 21 each year. The AG then has 30 days in which it can reject the proposed budget and require the Society to prepare a revised one. The Society's budget is rolled up in the AG budget.
- The Act provides that the AG and the Society are to enter into negotiations to arrive at memorandums of understanding for a three-year period. The agreement includes those matters for which legal aid may be provided, those matters for which the Society must not provide legal aid, priorities for funding, and other subjects.
- The Act empowers Cabinet to appoint an official trustee to manage the property and conduct the affairs of the Society in specific circumstances.

2. General By-Law

British Columbia has adopted a by-law containing the general principles of governance for the board. The by-laws include the following highlights:

- The role of the board is to ensure effective governance through setting direction, monitoring performance, and hiring and supporting the executive director.
- Key responsibilities of the board include developing vision, mission and objectives, monitoring performance (including fiscal performance), providing advice to the executive director on supervision, management and business administration, supporting effective communication, and appraising its own effectiveness.
- Specific details on the timing of and requirements for all board meetings, including a requirement to follow Robert's Rules of Order – a leading manual of parliamentary procedure to help organizations run more smoothly.
- The creation of a variety of sub-committees – all of which will develop terms of reference, objectives, timelines and budgets.
- The establishment of a nominating committee to create the executive committee.
- The establishment of a finance committee to make recommendations to the board on matters pertaining to the Society's finances, funding, and fiscal allocations, as well as additional specific functions including reviewing quarterly financial statements and forecasts and making recommendations with respect to the annual budget.
- Liaison directors and liaison committees are designated to establish strategic collaborations and relationships with external organizations that share a common interest with the Society.
- The establishment of advisory groups to provide expertise and feedback to the Society on service delivery, programs, priorities and policy issues.
- The by-laws provide for specific powers, authorities, roles and responsibilities of the executive director. Such responsibilities include leading the Society's strategic planning process, implementing the Society's strategic plan, developing and implementing plans for external communications, encouraging an open atmosphere at board meetings that promotes effective governance while steering clear of interference with operations, and providing new board members with an effective orientation to the business of the Society.
- The by-laws also provide for specific roles and responsibilities of the chair, including ensuring the board's operations are consistent with its by-laws, liaising between the board and executive director, ensuring the agendas for and the discussion at meetings focus on those issues that are within the board's mandate to decide, ensuring the development of board self-evaluation and recruitment processes, ensuring that an appropriate executive director performance evaluation and internal feedback process is in place and implemented.
- The by-laws also provide for specific roles and responsibilities as well as limitations for board members. For example, a board member will not engage in board business when the director's personal interest interferes with the director's capacity to act in the interests of the Society, will not disclose confidential board business, and will not direct staff or distract them unduly from the business operation of the Society.

3. Conflict of Interest By-Law

British Columbia has developed a conflict of interest by-law to provide clarity to this important issue. In short, the Society has a policy that tolerates a conflict of interest in restricted circumstances, to the extent that allowing participation in board decision-making of up to two directors who, as individual lawyers, or through their firms, receive significant financial remuneration from the Society. The by-law clearly defines a conflict of interest, requirements for disclosure, and a process for considering reported conflicts. Meeting minutes will record notices of conflict, the director's withdrawal from the meeting room during a discussion or vote as well as the board's determination.

4. Indemnification By-Law

British Columbia has developed an indemnification by-law to provide board members with indemnification from liability in connection with their responsibilities.

5. Memorandum of Understanding

The contents of the current MOU include the following highlights:

- A statement that "the Society is not an agent of the Government or the Law Society of British Columbia, and operates at arm's length from the Government, under the direction of an independent Board of Directors within a framework requiring accountability for the funding it receives from the Government."
- The MOU contains a schedule of shared objectives. One example is the desire to seek greater administrative and financial efficiency by better coordinating services among the AG, the Society and other justice system service providers. In addition, it is noted that the AG and the Society will work cooperatively to integrate their respective public legal education and information services.
- The Society and the AG share a concern that "exceptional matters" within the Society's mandate can materially affect the Society's ability to fulfil its statutory object of administering an effective and efficient legal aid system within the statutory limit on expenditures. Exceptional matters are specifically defined in the agreement. Examples include court ordered representation of individuals who do not qualify for legal aid, complex matters that necessitate the services of senior legal counsel, and legal matters involving eligible individuals in which a court has directed, or Government has agreed to, payment in excess of the standard fees and disbursements, as well as legal matters involving eligible individuals in which the aggregate of fees/disbursements exceeds $50,000.
- The MOU contains a statement of the roles and responsibilities of the AG. Highlights include: consulting with and considering the advice of the Society on matters relating to legal aid, including changes to applicable law and policy that affect the Society; and ensuring that the requirements necessary to discharge the Society's objects are understood and reflected in the Ministry's planning and resource allocation process.
- The MOU contains a statement of roles and responsibilities of the Society. Highlights include: applying memorandum funding only for and towards the provision of "funded services" and the establishment and maintenance of an administrative infrastructure necessary

for the provision of the funded services; establishing and monitoring appropriate conduct, planning and performance objectives for the Society, its members, employees, and service providers; and cooperating and coordinating with other justice partners and participating in justice reform initiatives. "Funded services" are a specific listing of services defined in schedules of the agreement.

- The MOU provides specific direction on how to deal with budget surpluses and shortfalls. A standing committee (composed of the assistant deputy minister responsible for the Society and the executive director) is empowered to review budget problems as soon as they become apparent in order to determine options, including deficit authorization, additional funding, cost deferral, or modification of the funded services required to be provided under the agreement.
- The agreement contains a schedule that provides that the maximum cost that the Society can incur for exceptional matters is $1.9 million for 02/03 and $2.7 million for 03/04 and the same amount for 04/05. The increased funding reflects the additional funding required to pay enhanced fees of $125 per hour to senior counsel in large and complex cases. The Society will establish an advisory panel of private bar lawyers to determine, in accordance with criteria the Society specifies, whether or not (a) a case requires senior counsel; and (b) a lawyer has the necessary qualifications to meet the needs of a particular case and is entitled to the senior counsel rate of $125.

6. Legal Services Society Board Governance Manual

- This 30-page manual contains valuable background as well as specific information, tools and guidance for board members on a number of core topics. These topics are as follows: independence and good governance, strategic planning function, risk management function, advising the executive director function, external communication function, board performance function, and the employer of the executive director function.
- This document elaborates upon the six key responsibilities of board members as provided in the General By-Law. Specifically speaking, the document provides some expansion on each of these identified board functions, and an explanation of why they are important and how they are performed. Policies and procedures are also included where they have been developed.
- The manual contains some "how-to" type information, adopted from the Conference Board of Canada for the legal aid environment.

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